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No. 92-2041

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SWAROVSKI INTERNATIONAL TRADING CORPORATION, A.G., SWAROVSKI MANAGEMENT AND CONSULTING, A.G., D. SWAROVSKI & CO., SWAROVSKI AKTIENGESELLSCHAFT, and SWAROVSKI AMERICA LIMITED,

Petitioners,

v.

EBELING & REUSS, LTD. t/a EBELING & REUSS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. When a court of appeals' summary affirmance, without opinion, of a district court's final judgment may reasonably be explained in at least two ways, one completely innocuous and the other alleged to create a circuit conflict, should the Court grant certiorari to resolve the hypothetical conflict?

2. Does the due process clause of the Fifth Amendment to the United States Constitution prohibit a court of appeals from summarily affirming, without opinion, a district court's final judgment whenever that judgment upholds a jury's award of punitive damages?

3. When petitioners have failed to preserve in the court of appeals a "substantive" due process challenge to the award of punitive damages imposed against them, should the Court disregard its usual practice of refusing to reach the merits of issues waived below in order to address petitioners' "substantive" due process challenge?

PARTIES TO THE PROCEEDINGS

Named as petitioners in this proceeding are Swarovski International Trading Corporation, A.G.; Swarovski Management & Consulting, A.G.; D. Swarovski & Co.; Swarovski Aktiengesellschaft; and Swarovski America Limited. The Court should note that petitioner Swarovski Management & Consulting, A.G. was not a party on appeal to the United States Court of Appeals for the Third Circuit. *See* App. 1 (caption of Third Circuit's judgment order listing all parties on appeal to the Third Circuit).

Respondent is Ebeling & Reuss, Ltd. t/a Ebeling & Reuss Company. Pursuant to Rule 29.1, Ebeling & Reuss, Ltd. t/a Ebeling & Reuss Company states that it has no parent or subsidiary companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	14
ARGUMENT	15
I. The Third Circuit's Judgment Order Does Not Give Rise To A Circuit Conflict	15
II. The Due Process Clause Of The Fifth Amendment Does Not Require A Court Of Appeals To Issue A Written Decision Whenever A District Court's Final Judgment Upholding A Jury's Award Of Punitive Damages Is To Be Affirmed	17
III. The Swarovski Defendants' "Substantive" Due Process Challenge To The Jury's Punitive Damages Award Is Both Waived And Without Merit	20
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 20

Alexander v. United States, 61 U.S.L.W. 4796 (U.S. June 28, 1993) (No. 91-1526) 19

Blanton v. North Las Vegas, 489 U.S. 538 (1989) 19

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 15, 20

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) (en banc) 17

Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989) 15

McLendon v. Continental Can Co., 908 F.2d 1171 (3d Cir. 1990) 20

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991) 11, 20, 21

Taylor v. McKeithen, 407 U.S. 191 (1972) (per curiam) .. 19

TXO Prod. Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (U.S. June 25, 1993) (No. 92-479).... 18, 19, 21, 22

United States v. Baynes, 548 F.2d 481 (3d Cir. 1977) (per curiam) 18

Yakus v. United States, 321 U.S. 414 (1944) 21

Zant v. Stephens, 462 U.S. 862 (1983) 16

United States Constitution:

U.S. Const. amend. V ..... i, iii, 2, 14, 17, 19

U.S. Const. amend. XIV 17

Court Rules:

U.S. S. Ct. R. 29.1 ii

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondent Ebeling & Reuss, Ltd. t/a Ebeling & Reuss Company (E&R) respectfully requests that the Court deny the petition for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit, which summarily affirmed, without opinion, the district court's final judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the constitutional provisions that petitioners Swarovski International Trading Corporation, A.G.; Swarovski

Management & Consulting, A.G.; D. Swarovski & Co.; Swarovski Aktiengesellschaft; and Swarovski America Limited (collectively referred to herein as "the Swarovski defendants") claim are involved, the second question presented for review implicates the due process clause of the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

In a Judgment Order entered April 7, 1993, *see* App. 1, a three-judge panel of the United States Court of Appeals for the Third Circuit summarily affirmed, without opinion, the final judgment of the United States District Court for the Eastern District of Pennsylvania awarding $42,350,000.00 in favor of E&R upon a jury's verdict against the Swarovski defendants. The final judgment was composed of $25,850,000.00 in compensatory damages and $16,500,000.00 in punitive damages.

In their petition for a writ of certiorari, the Swarovski defendants seek review only of the punitive damages component of the district court's final judgment. Thus, the Swarovski defendants do not challenge the Third Circuit's judgment order insofar as the Third Circuit affirmed the district court's final judgment upholding the jury's award of $25,850,000.00 in compensatory damages to E&R.

The facts, viewed in the light most favorable to E&R as the verdict winner, are as follows. Founded in 1886, E&R was at all times a Philadelphia-area distributor of fine gifts, glassware

and collectibles. Before staking its future on the Swarovski defendants' false promise of exclusive distribution of a line of crystal figurines, E&R was widely known as one of the oldest and most reputable distributors of fine gifts, glasswares and collectibles. *See* Rec. 1771.[1] As a result of the events giving rise to the judgment against the Swarovski defendants, E&R was forced into bankruptcy and its business ended. *See* Rec. 2146-47.

In mid-1986, the Swarovski companies sought a distributor for a new product line. E&R was introduced to the Swarovski companies by Peter Yenawine of Pynn Corporation. *See* Rec. 1809-11, 2162, 2663. Before the introduction, Yenawine had served as the director of design for the Swarovski companies and was the long-time friend of Helmut Swarovski of D. Swarovski & Co. *See* Rec. 2634-35, 2663, 2666. In return for an undisclosed commission paid by the European Swarovskis, *see* Rec. 4036, 4532-35, Yenawine facilitated a contract between E&R and the European Swarovski defendants that gave E&R the exclusive right to market this new product line, which consisted of Swarovski-manufactured miniature pressed crystal figurines manufactured by D. Swarovski & Co., Wattens, Austria.[2] *See* Rec. 1775-76, 1812-13, 1821-34, 1827, 2665, 3858, 3877, 3885, 3904; Supp. Rec. 14-16, 19-20. Under the agreement, E&R was entitled to market the products using E&R's registered "Crystal Signatures" trademark and the "Swarovski" name. *See* Rec. 1776, 1985-86, 3886, 3904, 3916-17; Supp. Rec. 104-30. On July 22, 1986, E&R placed its first order for the new products. *See* Rec. 1775, 3887-3903.

Before the contract was made, unbeknownst to E&R, D. Swarovski & Co.'s representative Helmut Swarovski intended to use E&R as a "guinea pig" to test the market for the new

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1. The appendix filed in the United States Court of Appeals for the Third Circuit is cited herein as "Rec." The supplemental appendix filed in the Third Circuit is cited herein as "Supp. Rec."

2. The term "pressed" was meant to distinguish the new line, in which E&R had exclusive rights, from the completely faceted, or "cut," Swarovski manufactured items, including Swarovski's well-known Silver Crystal collection, distributed by Swarovski America, to which E&R had no distribution rights. *See* Rec. 1813-15; Supp. Rec. 14.

product. If the product proved successful, the Swarovski entities intended to take back marketing rights to the miniature pressed figurines, leaving E&R without a product to sell. *See* Rec. 2142-45, 4485. Even though the Swarovski parties knew that E&R was counting on the success of this new venture to replace the profits E&R earned on another highly profitable line of figurines it had recently lost, the Swarovski parties induced E&R to stake its financial future on a promise the defendants never intended to keep. *See* Rec. 1772-73, 2017-18, 2141, 2145; Supp. Rec. 16-17.

Relying upon its exclusive right to market these new Swarovski figurines, E&R spent $850,000.00 developing a market for the line of products and, using marketing materials approved by the Swarovski entities, achieved an initial response that far surpassed anything that E&R had experienced in its many years of marketing and selling gift items. *See* Rec. 1779, 1839-43, 1847-48, 1859-71, 1874-83, 2023-24, 3908-15, 4172-91; Supp. Rec. 104-30.

Almost from the start, the European Swarovski defendants undercut E&R's ability to capitalize on the success of the new line by failing to confirm E&R's purchase orders, by failing to fulfill their manufacturing commitments and by failing to deliver sufficient product in time for E&R to fill its customers' orders for the peak selling opportunity at Christmas of 1986 and the spring of 1987. In fact, as a result of Swarovski's delays, E&R was compelled to postpone the full "roll out" of the line from Christmas of 1986 until July 1987. *See* Rec. 1803-04, 1844-47, 1899-1930, 3918-19, 3923, 3978-81, 3984-86, 3991, 4032.

While the European Swarovski entities were delaying, in the second-half of 1986, the president of Swarovski America Ltd., Lawrence Metcalfe, began his efforts to prevail upon the advisory board that oversees the Swarovski companies, known as the BEIRAT, to execute the plan to revoke E&R's right to use the Swarovski name. *See* Rec. 1959-64, 1973, 3883-84, 3916-17, 4021-28. In early 1987, Metcalfe sent a letter, secretly authorized by the BEIRAT, to E&R's retail customers informing them, falsely, that E&R had no right to use the Swarovski name and stating, falsely, that Swarovski had no connection with E&R's Crystal Signatures line. *See* Rec. 1760-67, 1930-31, 4038,

4043, 4474. Metcalfe and Gernot Langes-Swarovski, of Swarovski's marketing arm, obtained this authorization from the BEIRAT by falsely reporting that E&R had exceeded its authorization to use the "Swarovski" name, an assertion that Metcalfe and Langes-Swarovski knew to be untrue. *See* Rec. 1965-68, 4031, 4035-36. As a result of the Swarovski defendants' failure to make timely shipments of initial orders coupled with the Metcalfe letter, E&R suffered a dramatic decline in orders for the product line in the late spring of 1987. *See* Rec. 1931-34, 1948-53, 1957-59, 1995- 96. Indeed, Helmut Swarovski admitted that the letter caused harm to E&R's sales of Crystal Signatures. *See* Supp. Rec. 23-24.

As a result of Swarovski America's efforts, in early 1987, the BEIRAT, again unbeknownst to E&R, made formal its resolution to revoke E&R's right to use the "Swarovski" name. Accordingly, a Swarovski official, Dr. Martin Halusa, was assigned to study alternate "strategies" for accomplishing the revocation. *See* Rec. 1973, 1982-84, 2847-48, 2878-82; Supp. Rec. 132, 134, 136, 138, 141, 143. Halusa prepared a written "negotiating strategy" in which he emphasized the potential future profits of the E&R line, warned of the potential adverse consequences of trying to revoke E&R's right to use the "Swarovski" name without paying compensation to E&R and suggested that the Swarovski parties instead negotiate with E&R to convince it to give back voluntarily its exclusive rights. *See* Rec. 1972, 2852-55, 2877; Supp. Rec. 131-45.

Thereafter, Halusa attempted to negotiate with E&R to persuade it to relinquish *without compensation* its right to use the "Swarovski" name. *See* Rec. 1970-72, 2875-76. While Halusa suggested to E&R that this course was the best path to lessen the damage inflicted on it by the Metcalfe letter, Halusa never informed E&R that the Metcalfe letter had been approved by the BEIRAT or that the BEIRAT had secretly resolved to revoke E&R's right to use the name. *See* Rec. 1972. The Swarovski entities' plan to take over the E&R line thus remained secret.

When his efforts at persuasion failed, Halusa embarked on a second effort to wrest E&R's rights from it. He drafted a proposed written agreement between E&R and Swarovski to replace the existing agreement. Under the proposed written

agreement, E&R would be given the appearance of certainty in its business relations with the Swarovski entities but, instead of having unconditional exclusive rights to the entire product line, it, in fact, would receive exclusive rights *only* to items designed by E&R *and* approved by Swarovski. *See* Rec. 1987-94, 2886-91, 2901-03, 2925-26, 4064-65, 4084-97, 4099, 4101, 4105-21.

The Swarovski parties' attempts to renegotiate the agreement with E&R paused when it was reported in the fall of 1987 that E&R's parent, Alco Standard Corporation, intended to divest itself of a number of its divisions, including E&R. *See* Rec. 2123-26, 4126. On March 31, 1988, E&R was acquired by its own management and several outside investors. *See* Rec. 1771-72. No other changes in the business occurred. As a part of that transaction, E&R Ltd. was assigned all of the rights and obligations of E&R Co. under the exclusive distribution agreement with Swarovski. *See* Rec. 2129.

Independent of the change in E&R's ownership, the Swarovski defendants continued to implement their secret plan to take back the distribution rights to this product line. The Swarovski parties' breaches of their agreement with E&R continued. In August of 1987, the Swarovski entities secretly began implementing plans to market their miniature pressed crystal figurines to the Zales discount jewelry chain in breach of the exclusive distribution agreement with E&R. *See* Rec. 2113-17, 3996-97, 4126, 4192-93; Supp. Rec. 33-34, 37-38. At that time, the Swarovski entities owned a fifty-percent interest in Zales. On December 31, 1987, the Swarovski entities acquired complete ownership of Zales. *See* Rec. 2112.

Without disclosing the secret decision to revoke E&R's use of the "Swarovski" name and the ongoing efforts to market the line through Zales in competition with E&R, the Swarovski entities induced E&R to place additional orders in 1987. *See* Rec. 1767-68, 2120. After the European Swarovski entities failed to confirm these orders or comply with their delivery terms, E&R instructed the European entities to put the orders on "hold" until after the management buy-out, since it was necessary to establish a "cut-off" date for calculating the value of E&R's inventory. *See* Rec. 1768-70.

As was discovered in a secret Swarovski memorandum entitled "Projekt Konzept" prepared in the fall of 1987, in marketing the miniature pressed crystal figurines to Zales, the Swarovski entities employed confidential marketing research and other know-how that E&R had disclosed pursuant to the terms of the agreement requiring the parties to cooperate in developing and marketing the product line exclusively through E&R. *See* Rec. 2117-18, 2136-39, 4153-91, 4371-73. On May 31, 1988, Swarovski and Zales reached agreement on a plan, not involving E&R, to bring Swarovski miniature pressed crystal figurines to market in Zales stores by October of 1988. *See* Rec. 2121, 4382-95. These miniature pressed crystal figurines, indistinguishable from the products to which E&R had exclusive distribution rights, were sold through Zales as "Crystal Collectibles by Swarovski." *See* Supp. Rec. 164.

On June 1, 1988, one day after Swarovski and Zales made their still-secret plans to roll out "Crystal Collectibles" in the fall, the Swarovski entities had their United States attorney, Norman Orodenker, write to E&R informing E&R that it could no longer use the "Swarovski" name or sell the product line. *See* Rec. 4396. The letter precipitated E&R's filing of this lawsuit on June 20, 1988.

Soon after E&R first reached its agreement with the Swarovski entities in mid-1986, E&R undertook to negotiate an agreement with the Walt Disney Company so that Disney character figurines could be a part of E&R's Crystal Signatures line. *See* Rec. 1837-39, 3905-07, 4127-39. To that end, in the fall of 1986 Helmut Swarovski and Michael Russo of E&R met with Disney's director of giftware licensing. *See* Rec. 2057-58. At the meeting, after being advised that Disney had no interest in licensing a line of faceted figurines, Helmut Swarovski confirmed that any pressed Disney figurines would be a part of the new product line in which E&R had exclusive rights. *See* Rec. 1926. Thereafter, Disney signed a license agreement with E&R and a manufacturing agreement with the Swarovski entities. *See* Rec. 1985, 2055, 4105-21, 4127-39.

In late 1987, E&R began working with the Swarovski defendants to develop a collection of items to coincide with promotion of Mickey Mouse's sixtieth birthday, which was

celebrated in the fall of 1988. *See* Rec. 2058-64. In a series of meetings with Swarovski officials in Austria in May of 1988, after E&R's change in ownership, E&R re-approved initial designs for its Mickey's 60th Birthday Crystal Signatures Disney collection. *See* Rec. 2064-65. During those meetings, the Swarovski entities promised to provide actual samples in time for the "Disney Expo" trade show scheduled for September of 1988 in Walt Disney World in Orlando, Florida.[3] *See* Rec. 2044, 2064-67, 2073-74.

After receiving the June 1, 1988 letter from attorney Orodenker, E&R filed this suit and sought injunctive relief to require the Swarovski entities to complete the Disney samples in time for the "Disney Expo." *See* Rec. 2053. Despite entry of the district court's injunction ordering the Swarovski entities to produce the Disney samples by September 1, 1988, the Swarovski entities failed to comply with the injunction and refused to perform their obligations under their agreement with E&R. *See* Rec. 2074-86, 4397-4419, 4488-4526. Instead, the Swarovski parties chose to use their production capacity to manufacture "Crystal Collectibles" for sale in the Zales chain in further breach of the agreement. *See* Rec. 2087, 2099, 2102-09, 4472-73, 4481. According to Swarovski America documents, sales of "Crystal Collectibles" were "excellent." *See* Rec. 2987-89, 2991-92, 2997-98.

The jury, hearing all the evidence and observing firsthand, to quote the district judge, "the arrogance of defendants' witnesses," *see* App. 46, determined that the Swarovski parties defrauded E&R, breached their contract with E&R, tortiously interfered with E&R's contracts with its customers and with Disney, competed unfairly against E&R, violated E&R's registered "Crystal Signatures" trademark and misappropriated E&R's trade secrets. *See* App. 78-85, 90-91. The jury also found that Swarovski America had tortiously interfered with E&R's agreement with the European Swarovski defendants. *See* App. 82. Finally, the jury determined that all defendants except

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3. At these meetings, the Swarovski entities said nothing about terminating E&R's exclusive distributorship. The Swarovski parties did repeat their demands that E&R cease using the "Swarovski" name, although the Swarovski parties did not disclose their competing "Crystal Collectibles" line. *See* Rec. 2044-46, 2073-74.

Swarovski Aktiengesellschaft had conspired together to perpetrate the fraud and tortious interferences. *See* App. 86.

The parties stipulated at trial that the net worth of the Swarovski entities was *in excess of* $200,000,000.00, *see* App. 46. The jury returned a verdict totalling $55,641,364.00, with $34,141,364.00 representing compensatory damages and $21,500,000.00 representing punitive damages. *See* App. 88-89, 91-92. In ruling upon the Swarovski defendants' motions for judgment notwithstanding the verdict and to alter or amend the judgment, the district court reduced the amount of the judgment to $42,350,000.00, with $25,850,000.00 representing compensatory damages and $16,500,000.00 representing punitive damages. App. 46, 93-94. Thereafter, E&R and the Swarovski defendants appealed to the United States Court of Appeals for the Third Circuit.

In their opening brief on appeal to the Third Circuit, the Swarovski defendants raised eight separate issues. Only the final two issues were directed toward the jury's award of punitive damages in E&R's favor. In the seventh issue the Swarovski defendants raised on appeal, they asked "[w]hether the trial court erred in entering judgment for punitive damages awarded in part for causes of action as to which judgment n.o.v. was granted." *See* Opening Brief of Appellants in Third Circuit at 2. The substance of the Swarovski defendants' argument on this point was that the district court allegedly instructed the jury that it could award punitive damages based upon four claims of tortious interference and two claims of fraud and that, after deliberating, the jury returned a lump-sum award of punitive damages totalling $16,500,000.00.[4] *See* Resp. App. 6-7. The Swarovski defendants then noted that the district court had set aside, on post-judgment motions, five of the six claims that could have given rise to the jury's award of $16,500,000.00 in punitive

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4. As noted above, the jury had awarded E&R a total of $21,500,000.00 in punitive damages. The district court set aside $5,000,000.00 of that amount because that $5,000,000.00 was awarded solely upon other claims, misappropriation of trade secrets and unfair competition, for which the district court granted judgment notwithstanding the verdict in favor of the Swarovski defendants.

damages, but the district court nevertheless upheld the jury's entire $16,500,000.00 award of punitive damages. *See id.*

In response, E&R argued in its brief, citing to the instructions actually given to the jury, that the district court had instructed the jury that it could award punitive damages only if it found the Swarovski defendants liable for fraud. *See* Resp. App. 10 & n.23 (citing Rec. 3580). Thus, E&R noted, the district court correctly recognized that setting aside the jury's verdict on E&R's tortious interference claims in no way affected the jury's award of $16,500,000.00 in punitive damages. *See id.* Next, E&R explained that the claim of fraud that survived the Swarovski defendants' post-judgment motions encompassed all of the defendants' outrageous conduct that the jury heard about and saw at trial. *See* Resp. App. 11. E&R then argued that because punitive damages are imposed under Pennsylvania law based upon outrageous conduct rather than based upon the number of claims that permit an award of punitive damages, the district court did not err in upholding the jury's award of $16,500,000.00 in punitive damages in its entirety. *See id.*

In the eighth issue the Swarovski defendants raised on appeal in the Third Circuit, they asked "[w]hether the trial court erred in holding that the award of punitive damages to Plaintiff was supported by the evidence." *See* Opening Brief of Appellants in Third Circuit at 2. In the Argument section of their opening brief, the Swarovski defendants argued exclusively with respect to this issue that E&R failed to introduce sufficient evidence of outrageous conduct, the type of conduct required under Pennsylvania law in order for punitive damages to be awarded, and thus the jury's award of $16,500,000.00 in punitive damages in E&R's favor must be set aside in its entirety. *See* Resp. App. 8-9.

In response, E&R argued that the Swarovski defendants had waived their sufficiency argument by failing to raise the argument either in their motion for a directed verdict at the close of E&R's case-in-chief or when the Swarovski defendants renewed their directed verdict motion at the close of all the evidence. *See* Resp. App. 13. E&R also argued, citing to the Statement of Facts section of its brief, that it introduced at trial

more than sufficient evidence of outrageous conduct to justify an award of punitive damages under Pennsylvania law. *See id.*

It was not until the Swarovski defendants filed their reply brief in the Third Circuit that they first raised the issue of "substantive" due process on appeal. *See* Resp. App. 14-15. In fact, the Swarovski defendants' reply brief represented the first time on appeal to the Third Circuit that they cited to this Court's ruling in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032 (1991), a decision that this Court issued long before the Swarovski defendants even filed their appeal to the Third Circuit.[5] *See* Resp. App. 14. The Swarovski defendants' reply brief also represented the first time that they asked the Third Circuit to review not only whether punitive damages could be imposed at all, a question admittedly raised in the Swarovski defendants' opening brief on appeal, but also whether the jury's punitive damages award was greater than that reasonably necessary to punish and deter, a question never before raised on appeal. *See* Resp. App. 14-15.

Because the Swarovski defendants waited until their reply brief to launch a "substantive" due process attack on the jury's award of punitive damages, thus depriving E&R of any opportunity to respond, E&R filed a motion to draw the Third Circuit's attention to the fact that the Swarovski defendants' "substantive" due process argument should be deemed waived under governing Third Circuit law. *See* Resp. App. 1-15. E&R requested either that the offending paragraph of the Swarovski defendants' reply brief, which injected the "substantive" due process issue for the first time on appeal, be stricken or that E&R be granted leave to respond to the argument raised for the first time in the Swarovski defendants' reply brief. *See* Resp. App. 4-5.

In response to E&R's motion, the Swarovski defendants disclaimed that they were attempting to inject a "substantive" due process argument into the appeal and instead claimed to be citing *Haslip* only for the proposition that it is important for the Third Circuit to consider whether E&R introduced sufficient

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5. In fact, the district court itself cited to *Haslip* in its ruling on the parties' post-judgment motions. *See* App. 41-46.

evidence of outrageous conduct so as to support *any* award of punitive damages. *See* Resp. App. 17-18. The Swarovski defendants also correctly noted in their response to E&R's motion that the Third Circuit need not be presented with a motion to strike in order to hold that an argument raised for the first time on appeal in a party's reply brief is waived. *See* Resp. App. 18.[6]

On March 16, 1993, a three-judge panel of the United States Court of Appeals for the Third Circuit heard oral argument in the appeal and cross appeal. The Third Circuit allocated twenty-five minutes of argument time per side, and during the argument the court granted additional time to counsel for both sides.

At the close of oral argument, the Third Circuit panel directed counsel for the parties to have a transcript of the argument prepared for the court's use. *See* Resp. App. 44. The transcript of argument was filed with the Third Circuit on March 19, 1993.

The transcript of the oral argument provides further evidence that the Third Circuit concluded that the Swarovski defendants had waived their "substantive" due process challenge to the jury's award of punitive damages in E&R's favor. When counsel for the Swarovski defendants began the due process portion of his argument, the court of appeals asked "Why isn't the issue of whether the—of the District Court, whether the District Court properly declined to reduce the punitive damage award waived? Why isn't it waived?" *See* Resp. App. 29. After counsel for the Swarovski defendants spoke without further interruption for two additional pages of the transcript, the court of appeals interrupted counsel for the Swarovski defendants' due process argument to move on to another issue, one presented in E&R's cross appeal. *See* Resp. App. 30.

Twenty-two days after the appeal and cross appeal had been argued, the Third Circuit on April 7, 1993 entered a judgment

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6. Two days after the Third Circuit entered its judgment order affirming, in its entirety, the district court's final judgment, the Third Circuit entered an order denying E&R's motion to strike. At that time, E&R's motion to strike was moot.

order affirming, in its entirety, the district court's final judgment. *See* App. 1. The judgment order stated, in relevant part:

> After consideration of all contentions raised by appellants,
>
> IT IS ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Id.

On April 21, 1993, the Swarovski defendants filed a petition for rehearing containing a suggestion for rehearing in banc. Two days later, on April 23, 1993, the Third Circuit entered an order requiring E&R to file an answer to the petition for rehearing, together with a sufficient number of copies of the answer to permit its distribution to the entire in banc court. E&R filed its answer to the rehearing petition on May 5, 1993. A copy of E&R's answer to the petition for rehearing is set forth in the appendix to this brief in opposition. *See* Resp. App. 45-66.

In an order dated May 17, 1993, the Third Circuit denied the Swarovski defendants' petition for rehearing and denied their suggestion for rehearing in banc without recorded dissent. *See* App. 3-4. On May 19, 1993, the Swarovski defendants filed in the Third Circuit a motion seeking a stay of that court's mandate. On May 20, 1993, E&R filed a response opposing the motion for a stay. On June 23, 1993, the Third Circuit issued an order denying the Swarovski defendants' motion for a stay of the mandate. The Third Circuit's mandate issued on that same day.

Also on June 23, 1993, the Swarovski defendants filed their petition for a writ of certiorari in this Court. On June 24, 1993, the Swarovski defendants filed an application, docketed in this Court at A-967, directed to JUSTICE SOUTER, in his capacity as Circuit Justice for the United States Court of Appeals for the Third Circuit, seeking the recall and stay of the Third Circuit's mandate.

In their application, the Swarovski defendants recognized that they had to establish three things in order to obtain relief: (1) that a reasonable probability existed that this Court would grant their petition for a writ of certiorari, a copy of which was attached to the application; (2) that there was a fair prospect that a majority of this Court would conclude that the Third Circuit's

decision was in error; and (3) that irreparable harm would result from the denial of the stay.

On June 28, 1993, JUSTICE SOUTER denied the Swarovski defendants' application to recall and stay the Third Circuit's mandate. Shortly thereafter, the Swarovski defendants paid the judgment in favor of E&R, which, including accrued interest, totalled in excess of $53,000,000.00.[7]

SUMMARY OF THE ARGUMENT

This Court should deny the Swarovski defendants' petition for a writ of certiorari.

With respect to the first question presented, the Third Circuit's judgment order, which summarily affirmed the district court's final judgment upholding the jury's $16,500,000.00 punitive damages award, rests on a proper and unchallenged application of Pennsylvania law. Understood in that manner, the Third Circuit's judgment order does not give rise to the circuit conflict the Swarovski defendants posit in their first question presented.

As to the second question presented, the due process clause of the Fifth Amendment does not require a court of appeals to render a written opinion whenever it affirms a district court's judgment upholding a jury's award of punitive damages. This question clearly is not deserving of this Court's attention.

With respect to the third question presented, the Swarovski defendants waived any "substantive" due process challenge to the jury's award of punitive damages by failing to raise the issue in their opening brief in the Third Circuit. As a result, under this Court's usual practice, the Swarovski defendants'

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7. In their application made to JUSTICE SOUTER, the Swarovski defendants stated that "[i]f the mandate of the Third Circuit is not recalled, it will effectively moot Swarovski's pending Petition for a Writ of Certiorari by depriving it of its point and efficacy." *See* Swarovski Defendants' Application to Recall and Stay Mandate of United States Court of Appeals for the Third Circuit Pending Certiorari (A-967) at page 9. E&R agrees that, in its current posture, the Swarovski defendants' petition for a writ of certiorari is, by the Swarovski defendants' own admission, both "moot" and without "point and efficacy." *Id.*

"substantive" due process challenge should not be reviewed on writ of certiorari.

ARGUMENT

I. The Third Circuit's Judgment Order Does Not Give Rise To A Circuit Conflict

The Swarovski defendants contend, in their first question presented for review, that the Third Circuit's summary affirmance, without opinion, of the district court's final judgment upholding the jury's award of $16,500,000.00 in punitive damages creates a circuit conflict. In truth, the Swarovski defendants' assertion of a circuit conflict is purely theoretical and thus is not deserving of this Court's attention.

This Court explained in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989), that:

> In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

The Third Circuit's decision represents a correct application of Pennsylvania law to the particular circumstances of this case. The Swarovski defendants do not contend otherwise.

The Supreme Court of Pennsylvania explained in *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803 (Pa. 1989), that under Pennsylvania law the purpose of punitive damages is to "punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct . . . ." Thus, under Pennsylvania law it is not the number of claims that determines the amount of punitive damages that may be awarded; instead, it is the underlying conduct giving rise to a claim for which punitive damages may be awarded.

The district court upheld the jury's finding that the Swarovski entities defrauded E&R Co. The evidence introduced in support of that finding encompassed all of the Swarovski defendants' outrageous conduct that the jury heard about and saw at trial. The Swarovski entities engaged in a single scheme of

fraudulent conduct that began before the time they entered into their contract with E&R Co. and ended at the time that E&R Ltd. discovered, after initiating this lawsuit, that the Swarovski entities were themselves actually selling the pressed crystal figurine line, in violation of E&R's promised exclusive rights in that line. It is this conduct for which the Swarovski defendants remain liable for fraud, and it is this very same conduct (and no other) upon which the jury based its award of punitive damages.[8]

In this respect, the Third Circuit's affirmance is in accord with this Court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983). In that case, the Court examined whether the United States Court of Appeals for the (Former) Fifth Circuit correctly vacated the death sentence that the State of Georgia had imposed upon respondent. The court of appeals had vacated the sentence because one of several aggravating circumstances that the jury expressly found was later declared, by the Supreme Court of Georgia, to be unconstitutionally vague. This Court reversed the Fifth Circuit's judgment and reinstated the death sentence, holding that the case was not governed by the "rule derived from the *Stromberg* [*v. California*, 283 U.S. 359 (1931)] case . . . that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient." 462 U.S. at 881. The Court continued: "This rule does not require that respondent's death sentence be vacated, because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty." *Id.*

Similarly, here the jury expressly found in favor of E&R Co. on its fraud claim against the Swarovski defendants. Given that the evidence underlying that fraud claim encompassed all of defendants' outrageous conduct that the jury heard about and

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8. The Third Circuit had before it in the appendix on appeal the entire trial transcript, *see* Rec. 1521-3831. Thus, the Third Circuit was in a position to determine, as it did, that the fraud claim the district court upheld encompassed all of the outrageous conduct that the jury heard about and saw at trial.

saw at trial, and since the jury's $16,500,000.00 punitive damages award was necessarily based on that very conduct, the Third Circuit did not err in upholding the jury's entire award of punitive damages.

Because the jury's entire award of punitive damages had to be sustained as a matter of Pennsylvania substantive law, the Third Circuit never reached the point of deciding whether a new trial was mandated, as a matter of federal law, on the question of punitive damages. Thus, the circuit conflict that the Swarovski defendants' posit is, in all likelihood, fictitious.[9]

The Third Circuit's decision represents an unchallenged, proper application of Pennsylvania law, and the Swarovski defendants' assertion of a circuit conflict is thus hypothetical at best. As a result, this Court should reject the Swarovski defendants' first reason for granting certiorari.

II. The Due Process Clause Of The Fifth Amendment Does Not Require A Court Of Appeals To Issue A Written Decision Whenever A District Court's Final Judgment Upholding A Jury's Award Of Punitive Damages Is To Be Affirmed

In the second question presented for review, the Swarovski defendants ask this Court to hold that the due process clause of the Fifth Amendment requires a court of appeals to issue a written decision explaining the reasons why a district court's final judgment upholding a jury's award of punitive damages is to be affirmed.[10]

The Swarovski defendants' argument mistakes the absence of a written decision for a lack of appellate review. The Third

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9. The Swarovski defendants raised the circuit conflict question in their rehearing petition filed in the Third Circuit. *See* App. 110-11; *cf.* Resp. App. 59-61. The Swarovski defendants' failure to get even a single recorded vote in favor of rehearing, *see* App. 3-4, demonstrates that a circuit conflict exists, if at all, only in the minds of the Swarovski defendants.

10. The Swarovski defendants couch their argument in terms of the Fourteenth Amendment. However, because their argument concerns the procedures that a federal court must follow, their argument is better viewed as arising under the Fifth Amendment. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1411 n.1 (4th Cir. 1992) (en banc).

Circuit explained long ago that its use of a judgment order does not indicate that an appeal is receiving less than close appellate scrutiny. *See United States v. Baynes*, 548 F.2d 481, 482-84 (3d Cir. 1977) (per curiam) (rejecting due process challenge to the affirmance of a criminal conviction by judgment order).

The three-judge panel of the Third Circuit assigned to hear the Swarovski defendants' appeal in this case read and considered briefs totaling nearly 175 pages and heard nearly an hour's worth of oral argument. The transcript of oral argument, *see* Resp. App. 20-44, and the text of the judgment order that the panel issued, *see* App. 1-2, make clear that the panel considered all of the contentions raised on appeal. The Third Circuit panel determined, based either upon waiver or lack of substantive merit, or both, that the arguments the Swarovski defendants raised on appeal were unavailing.

Nor did the review the Swarovski defendants received from the Third Circuit end with the three-judge panel assigned to their appeal. After receiving the Swarovski defendants' petition for rehearing and suggestion for rehearing in banc, *see* App. 96-119, the Third Circuit ordered E&R to file an answer in sufficient number for distribution to the entire in banc court. After reviewing the Swarovski defendants' rehearing petition and E&R's answer thereto, *see* Resp. App. 45-66, none of the twelve active judges on the Third Circuit noted his or her dissent from the denial of rehearing in banc. *See* App. 3-4. While the Swarovski defendants are no doubt disappointed with the outcome of their appeal, it cannot be gainsaid that their appeal received sufficient appellate review.

The rule of law that the Swarovski defendants seek to have this Court announce would be contrary to this Court's decisions and would have no basis in reason. In the Court's recent decision in *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993) (No. 92-479), the plurality opinion of JUSTICE STEVENS rejected TXO's due process attack upon the trial judge's failure to announce his reasons for his denial of TXO's postverdict motions. JUSTICE STEVENS wrote, in a portion of the plurality opinion joined by THE CHIEF JUSTICE, JUSTICE BLACKMUN and JUSTICE KENNEDY:

> The only basis for criticizing the trial judge's review of the punitive damages award is that he did not articulate his reasons for upholding it. He did, however, give counsel an adequate hearing on TXO's postverdict motions, and during one colloquy indicated his agreement with the jury's appraisal of the egregious character of the conduct of TXO's executives. See n. 12, *supra.* While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient despatch of their duties, *we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation.*

Id. at 4772 (emphasis added). This Court should similarly reject the Swarovski defendants' second reason for granting certiorari.

In fact, to accept the Swarovski defendants' arguments would be to contradict this Court's statement in *Taylor v. McKeithen,* 407 U.S. 191, 194 n.4 (1972) (per curiam), that:

> We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances.

The consequences of the rule that the Swarovski defendants would have the Court adopt would be far-ranging. If the courts of appeals were required under the Fifth Amendment to issue written decisions on every appeal affirming a judgment that awards punitive damages, then it would seem to follow that the Fifth Amendment likewise would require that the courts of appeals issue a written opinion explaining every affirmance of a judgment of conviction and sentence where the court upholds a jail sentence. *Cf. Blanton v. North Las Vegas,* 489 U.S. 538, 542 (1989) (loss of liberty is a more severe form of punishment than any monetary sanction).[11]

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11. This description of the Court's ruling in *Blanton* is taken, verbatim, from the opinion of the Court in *Alexander v. United States,* 61 U.S.L.W. 4796, 4799 (U.S. June 28, 1993) (No. 91-1526).

For these reasons, this Court should reject the Swarovski defendants' second ground for certiorari.

III. The Swarovski Defendants' "Substantive" Due Process Challenge To The Jury's Punitive Damages Award Is Both Waived And Without Merit

Before the Third Circuit, the Swarovski defendants admitted that they failed to preserve a due process challenge to the jury's award of punitive damages. In their forty-nine page opening brief on appeal, the Swarovski defendants did not advance a due process challenge to the jury's award of punitive damages or even cite to this Court's opinion in *Haslip*. Instead, the Swarovski defendants opted in their opening brief on appeal to challenge the sufficiency of the evidence to support the fraud claim that gave rise to punitive damages and the sufficiency of the evidence of outrageous conduct to support *any* award of punitive damages.

The "substantive" due process challenge that is the subject of the third question presented in the Swarovski defendants' petition was not raised on appeal to the Third Circuit until the Swarovski defendants' reply brief. *Compare* Resp. App. 6-9 (Swarovski Defendants' Third Circuit Opening Brief at pp. 44-48) *with* Resp. App. 14-15 (Swarovski Defendants' Third Circuit Reply Brief at pp. 31-32) and App. 114-16 (Swarovski Defendants' Third Circuit Petition for Rehearing at pp. 12-14).

Under the decisional law of this Court and of the Third Circuit, the Swarovski defendants have forever waived any "substantive" due process challenge they may have had. *See Browning-Ferris Indus.*, 492 U.S. at 277 & n.23 (due process challenge to award of punitive damages waived for failure to preserve issue at necessary points in proceedings below); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1183 (3d Cir. 1990) ("[s]ince the reply brief is the final written word from appellate parties without leave of the court, R. App. P. 28(c), it

would be manifestly unfair to permit an appellant to interject issues to which the appellee cannot now respond").[12]

Before the Third Circuit panel, the Swarovski defendants conceded that they waited too long to assert a *Haslip* challenge on appeal. *See* Resp. App. 29-30 (Transcript of 3d Cir. Oral Argument in Nos. 92-1723 & 92-1746 at p. 20); Resp. App. 18 (Swarovski Defendants' Response Filed Dec. 24, 1992 to Motion to Strike at p. 3). As a result, this Court should not reach out to consider whether the Third Circuit erred when that court's decision may have been based on the Swarovski defendants' failure to preserve a "substantive" due process challenge to the award of punitive damages.

This is not to suggest, of course, that the Swarovski defendants' "substantive" due process challenge has any merit. The jury's punitive damages award clearly survives review under both *TXO* and *Haslip*. The district court reviewed the punitive damages award for reasonableness. *See* App. 44-46. Certainly, in light of the Swarovski defendants' intentional and malicious outrageous conduct, described above in the Statement of the Case at 2-9 and evidenced in the references to the record in the Third Circuit, it cannot be said as a matter of "substantive" due process that the jury's award of punitive damages in this case is unreasonable.

The district court gave the jury adequate guidance concerning the purposes of punitive damages, required the jury to consider the character and degree of the Swarovski defendants' wrongs, and explained that the imposition of punitive damages was not mandatory. *See* Rec. 3580-81. The district court also informed the jury of the parties' agreement concerning the Swarovski defendants' net worth, which was stipulated to be *in excess of* $200,000,000.00.[13] *See* Rec. 3528.

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12. *See also Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

13. When the Swarovski defendants assert in their petition that the stipulation provided that their net worth *equalled* $200,000,000.00, they are not telling the truth. *See, e.g.*, App. 46 ("The defendants' net worth was

In short, the jury received adequate guidance from the district court concerning whether to award punitive damages, and it cannot be said that the jury's award is so "grossly excessive" as to violate due process. *See TXO,* 61 U.S.L.W. at 4771 (STEVENS, J., joined by THE CHIEF JUSTICE and BLACKMUN, J.); *see also id.* at 4774 (SCALIA, J., joined by THOMAS, J.) ("The Court's decision is valuable, then, in that the great majority of due process challenges to punitive damages can henceforth be disposed of simply with the observation that 'this is no worse than *TXO.*' ").

Because the Swarovski defendants' "substantive" due process challenge to the jury's award of punitive damages was waived in the Third Circuit, and because the challenge is, in any event, clearly without merit, this Court should reject the Swarovski defendants' third ground for granting certiorari.

NOTES *(Continued)*

stipulated to be in excess of $200 million dollars."); *see also* Rec. 3517-18, 3528 (setting forth actual stipulation).

CONCLUSION

For the foregoing reasons, E&R respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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RESPONDENT'S APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1746

EBELING & REUSS LTD., t/a
EBELING & REUSS COMPANY,

Plaintiff/Appellee,

v.

SWAROVSKI INTERNATIONAL TRADING CORPORATION A.G.,
SWAROVSKI AMERICA LIMITED,
SWAROVSKI AKTIENGESELLSCHAFT and
D. SWAROVSKI & CO.,

Defendants/Appellants.

MOTION OF PLAINTIFF/APPELLEE EBELING & REUSS, LTD. TO STRIKE ARGUMENT RAISED FOR THE FIRST TIME IN THE REPLY BRIEF OF DEFENDANTS/APPELLANTS

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MOTION TO STRIKE

In their reply brief filed December 14, 1992 in appeal No. 92-1746, defendants/appellants Swarovski International Trading Corporation A.G., Swarovski America Limited, Swarovski Aktiengesellschaft and D. Swarovski & Co. have asserted for the first time on appeal that the jury's award of punitive damages on Ebeling & Reuss's fraud claim cannot survive due process scrutiny. Plaintiff/appellee Ebeling & Reuss (E&R) respectfully moves for the entry of an order striking that argument from the Swarovski defendants' reply brief because the argument was raised there for the first time on appeal, thus depriving E&R of the opportunity to respond. In support of this motion, E&R avers:

1. In appeal No. 92-1746, the Swarovski defendants have appealed from the final judgment of the United States District Court for the Eastern District of Pennsylvania upholding the jury's award of $16.5 million in punitive damages on E&R's fraud claim against the Swarovski defendants.

2. On October 14, 1992, the Swarovski defendants filed their opening brief in appeal No. 92-1746.

3. In their opening brief, the Swarovski defendants advanced two challenges to the jury's award of punitive damages on E&R's fraud claim. *See* Exhibit "A," Opening Brief of Swarovski Defendants at 44-48 (reproducing in full the Swarovski defendants' challenges to the jury's award of punitive damages on E&R's fraud claim as set forth in the Swarovski defendants' opening brief on appeal). First, the Swarovski defendants contended that "the district court improperly allocated the entire punitive damage award to the one affirmed claim of fraud." *See id.* at 44-46. Second, the Swarovski defendants contended that "there is no substantial evidence of outrageous conduct to support an award of punitive damages." *See id.* at 46-48.

4. Nowhere in their opening brief did the Swarovski defendants argue that the jury's award of punitive damages violated the Swarovski defendants' right to due process under the United States Constitution. *See* Exhibit "A," Opening Brief of Swarovski Defendants at 44-48 (reproducing in full the

Swarovski defendants' challenges to jury's award of punitive damages on E&R's fraud claim).

5. E&R filed its brief in response to the brief of the Swarovski defendants on November 13, 1992.

6. In its response brief, E&R noted on page 37 and in footnote 24 that the Swarovski defendants had failed in their opening brief on appeal to raise any challenge to the constitutionality of the jury's award of punitive damages on E&R's fraud claim. *See* Exhibit "B," Response Brief of E&R at 37 & n.24.

7. The failure of the Swarovski defendants to raise a due process challenge to the jury's award of punitive damages on E&R's fraud claim in their opening brief on appeal was noteworthy because the Swarovski defendants had advanced such a due process challenge in the district court.

8. Because the Swarovski defendants did not raise a due process challenge to the jury's award of punitive damages in their opening brief on appeal, E&R did not address the merits of such a challenge in E&R's response brief. *See* Exhibit "B," Response Brief of E&R at 34-37 (reproducing in full E&R's response to the issues raised in the Swarovski defendants, opening brief on appeal pertaining to the jury's award of punitive damages on E&R's fraud claim).

9. On December 14, 1992, the Swarovski defendants filed their reply brief in support of their appeal at No. 92-1746.

10. In their reply brief, the Swarovski defendants have asserted for the first time on appeal, in a paragraph that begins on page 31 and ends on page 32, that the jury's award of punitive damages on E&R's fraud claim violates their right to due process under the United States Constitution. *See* Exhibit "C," Reply Brief of Swarovski Defendants at 31-32.

11. Federal Rule of Appellate Procedure 28(c) provides, in relevant part:

> **Reply Brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court.

Fed. R. App. P. 28(c).

12. Under Rule 28(c), appellee E&R is prohibited, without leave of court, from answering the due process challenge to the jury's award of punitive damages on E&R's fraud claim that the Swarovski defendants have raised for the first time on appeal in their reply brief.

13. It is well settled that "[a]s a general matter, the courts of appeals will not consider arguments raised on appeal for the first time in a reply brief." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205 n.29 (3d Cir. 1990).

14. This Court explained in *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1183 (3d Cir. 1990), that "[s]ince the reply brief is the final written word from appellate parties without leave of the court, R. App. P. 28(c), it would be manifestly unfair to permit an appellant to interject issues to which the appellee cannot now respond."

15. This Court suggested in *Hoxworth*, 903 F.2d at 205 n.29, that "exceptional circumstances" are required to permit an appellant to raise an argument for the first time on appeal in the appellant's reply brief.

16. Here, the Swarovski defendants rely upon *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991), in support of their newly raised due process challenge to the jury's award of punitive damages on E&R's fraud claim.

17. The Supreme Court of the United States rendered its decision in *Haslip* on March 4, 1991, some nineteen months before the Swarovski defendants filed their opening brief in this appeal.

18. The district court brought the *Haslip* decision to the attention of the Swarovski defendants in the district court's opinion, which provides the basis for the judgment that is now before this Court for review.

19. Thus, no "exceptional circumstances" exist here to justify deviating from the general rule that arguments raised on appeal for the first time in a reply brief are waived.

WHEREFORE, E&R respectfully requests the entry of an order striking from the Swarovski defendants' reply brief filed December 14, 1992 in appeal No. 92-1746 the paragraph that begins on page 31 and ends on page 32 of the reply brief,

including the footnote to that paragraph. *See* Exhibit "C," Reply Brief of Swarovski Defendants at 31-32. Alternately, E&R respectfully requests leave, pursuant to Federal Rule of Appellate Procedure 28(c), to respond to the due process challenge to the jury's award of punitive damages on E&R's fraud claim, which the Swarovski defendants have raised for the first time on appeal in their reply brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Strike was served via hand delivery upon the attorney for defendants/appellants, at the address and on the date that appear below:

Theodore R. Mann, Esquire
Mann, Ungar & Spector, P.A.
1709 Spruce Street
Philadelphia, PA 19103

Dated: December 21, 1992

/s/ Howard J. Bashman

Howard J. Bashman

is therefore completely contrary to the terms of the Disney contract itself, and requires reversal under the holding of this court in *Tunis Bros.* In that decision, the Court made it clear that a party is limited to seeking lost profits damages for the actual duration of the contract term. It may not expand that time period to include additional years in which it would hope to operate, but for which it had no commitment. *See* 952 F.2d at 735.

V. THE DISTRICT COURT ERRED IN FAILING TO GRANT SWAROVSKI'S MOTION TO ALTER OR AMEND THE JUDGMENT BECAUSE THE AWARD OF $16.5 MILLION IN PUNITIVE DAMAGES IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

The district court affirmed the award of $16.5 million in punitive damages based solely on the jury's finding of fraud. For two reasons, the assessment of punitive damages was improper and must be reversed.

A. The District Court Improperly Allocated The Entire Punitive Damage Award To The One Affirmed Claim Of Fraud.

The jury awarded $16.5 million in punitive damages based on its liability findings on E&R's multiple claims of tortious interference and fraud, but did not apportion this amount between these separate claims. Although the district court reversed judgment on E&R's four claims of tortious interference and its claim of fraud against E&R, Ltd., it nonetheless affirmed the $16.5 million in punitive damages in its entirety. Such affirmance of the punitive damage award, in effect allocating the entire award to only one of the multiple claims E&R argued to the jury in connection with punitive damages, was improper.

It is well-established that where a general award of punitive damages is based upon more than one cause of action, one of which is reversed, the punitive damage award must be set aside. *See Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 104 (2d Cir. 1989); *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1562 (11th Cir. 1984), *cert. denied*, 484

U.S. 1006 (1988). *See also Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 667, 687 n.19 (3d Cir. 1991), *cert. denied,* 112 S.Ct. 1668 (1992). In *Litman,* the plaintiff obtained an award of punitive damages based on two claims of slander. On appeal, the Eleventh Circuit reversed judgment on one of the two claims. Based on that reversal, the Eleventh Circuit remanded the punitive damage issue to the trial court for a new trial, stating that "[t]his result is unavoidable in light of the fact that the jury's $250,000 punitive damage award was made in response to a single question on the special verdict form." *Id.* Indeed, because punitive damages are awarded based upon a theory that outrageous conduct should be punished, the court held that the punitive damage award could not be sustained "based partly on the perceived outrageousness of that (nonslanderous) statement." *Id. See also Barnes Group, Inc. v. C&C Prods., Inc.,* 716 F.2d 1023, 1034 (4th Cir. 1983) (vacating and remanding on the issue of punitive damages because the award hinged on six liability findings, four of which were reversed).

Similarly, the plaintiff in *Murphy Door* obtained an award of punitive damages based on claims of trademark and unfair competition. In reversing the liability finding on the trademark claim, the Second Circuit held that the award of punitive damages must be remanded because "we are unable to determine what fraction of the punitive damages award, if any, is attributable to unfair competition." 874 at 104.

In this case, the jury awarded $16.5 million in punitive damages in response to a single question on the special verdict. *See* App. 1473a-75a (Opinion at Appendix B). As the district court recognized, this award was based on four claims of tortious interference and on two claims of fraud, one before and one after the buy-out. *See* App. 1436a (Opinion at 43). Nonetheless, the court upheld the award despite reversing the jury's finding of liability on five of the six claims supporting it. As discussed above, the district court cannot uphold an award of punitive damages in its entirety based partly on claims which have been held to state no legal cause of action. Consequently, the award of punitive damages must be reversed and remanded.

B. There Is No Substantial Evidence Of Outrageous Conduct To Support An Award Of Punitive Damages.

In awarding punitive damages, Pennsylvania law requires that the fact-finder consider (1) the character of the act, (2) the nature and extent of the harm, and (3) the wealth of the defendant. *Tunis Bros.*, 952 F.2d at 740 (citing *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989)). Pennsylvania law further requires that, with regard to the first factor, the defendant's conduct be outrageous. *Id.* (citing *Feld v. Merriam*, 485 A.2d 742, 748 (Pa. 1984)).

In *Tunis Bros.*, this Court addressed the requirement of outrageous conduct in the context of a claim for fraud:

> [w]here fraud . . . is the basis for the recovery of compensatory damages, . . . the same fraud is not alone a sufficient basis upon which to premise an award of punitive damages . . . . If the rule were otherwise, punitive damages could be awarded in all fraud cases. That is not the law. The rule, rather, is that for punitive damages to be awarded there must be acts of malice, vindictiveness, and a wholly wanton disregard for the rights of others.

952 F.2d at 740-41 (citing *Smith v. Renault*, 564 A.2d 188, 193 (Pa. 1989)). Based on this proposition, this Court concluded that an award of punitive damages "requires a quantum of outrageous conduct in addition to that undergirding the fraud liability and compensatory damages." *Id.* at 741.

The district court completely ignored this Court's discussion of the standard by which to evaluate the requisite outrageous conduct. In its opinion, which directs scant attention to the requirement at all, the district court supported its belief that there was outrageous conduct on the part of Swarovski by simply stating that Swarovski's witnesses were arrogant, and that the jury found against Swarovski on all counts.[15] App. 1436a (Opinion at 43).

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15. The district court also states that Swarovski was using its manufacturing capacity to make injection molded figurines to compete with E&R while refusing to deliver the Disney figurines in breach of contract. App. 1436a (Opinion at 43). Presumably, this statement refers to the preliminary injunction, in which the district court ordered Swarovski to produce such figurines.

These "facts" are entirely insufficient to support the requisite finding of outrageous conduct. Any arrogance on the part of Swarovski's witnesses is completely irrelevant to an award of punitive damages. Punitive damages can only be awarded based on tortious conduct of a defendant, not on the personality traits of its officers at trial.[16] Similarly, the finding of liability, even on all counts, is not evidence of outrageous conduct. *See Tunis Bros.*, 952 F.2d at 741; *Smith*, 564 A.2d at 193. Rather, there must be acts of malice, vindictiveness or wholly wanton disregard of the rights of others, in addition to that which supported the finding of fraud liability and the award of compensatory damages, in order to support an award of punitive damages. *Tunis Bros.*, 952 F.2d at 741. In this case, E&R introduced no evidence of outrageous conduct in addition to that which it used to argue its claim of fraud, namely that Swarovski induced E&R into a contract for the purpose of testing the market. Such evidence is legally insufficient to support an award of punitive damages under Pennsylvania law and the decisions of this Court, and the award of punitive damages should be reversed.

CONCLUSION

Because the Plaintiff neither established the elements of a cause of action against the Swarovski Defendants, nor offered proper evidence of the damages that it suffered by reason of the conduct alleged, the judgment entered below should be reversed. Given that the evidence introduced at trial conclusively

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However, as this matter was not before the jury, it cannot support a finding of outrageous conduct on the part of Swarovski.

16. The trial court's reliance in the Opinion on its perception of "arrogance" in Swarovski's witnesses is a troubling reprise of a hostility toward Defendants that pervaded the proceedings below and lead to Swarovski's filing of the Motion for Disqualification considered in the opinion. Swarovski does not appeal here from the denial of that motion. However, the re-emergence of this aspect of the case as a basis for upholding a $16.5 million punitive damage award requires that we note that the Opinion of the district court understated the tenor of what went on below. *Compare* App. 1461a-62a (Opinion at 68-69), *with* 204a.

evidence available. There is no evidence here that industry performance contradicted the Cook projections.[22]

The Swarovski defendants also challenge Cook's extrapolation from the initial three-year projections to project product line growth over a twelve-year period. Contrary to the defendants' assertions, Cook's projections were not based solely or uncritically upon the initial projections but were supported by numerous objective factors. *See* App. at 2302, 2342, 3159-61. As a result, this Court should hold that the district court did not err in rejecting defendants' demand that the jury's award of lost profits be set aside.

IX. The Swarovski Entities' Challenge to the Jury's Award of Punitive Damages is Both Waived and Without Merit

In the final issue they raise on appeal, the Swarovski entities advance two challenges to the district court's refusal to set aside the jury's award of $16.5 million in punitive damages. First, the Swarovski parties contend that because the district court granted them judgment notwithstanding the verdict on three of the four claims that *could* support an award of punitive damages, the district court should have vacated the $16.5 million dollar award and held a new trial limited to the assessment of punitive damages.[23] Second, the Swarovski entities

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22. The Swarovski entities were themselves in the crystal marketing industry. If actual industry performance rebutted E&R's projections, the Swarovski defendants certainly had the right to introduce evidence of such actual performance. In fact, the projections E&R relied upon at trial were considered reasonable by the Swarovski parties before this suit commenced, *see* App. at 1855, 1862-64, 1872-73, 1903-05; Supp. App. at 143, were consistent with the Swarovski parties' own secret projections of $19 million in profits over the first three years, *see* App. at 1982-84, 2880-81, 4182-83; Supp. App. at 12-13, 27, and were consistent with Swarovski America's "excellent" sales of the knock-off "Crystal Collectibles" line, which was not marketed as effectively as E&R had marketed its "Crystal Signatures" line, *see* App. at 3119-22, 3160-61.

23. Despite the Swarovski defendants' assertion to the contrary, the district court did not set aside *three* of the *four* claims that *could* have supported an award of punitive damages. The district court charged the jury

argue that there is no evidence of their outrageous conduct to support the jury's award of punitive damages. Neither argument has any merit.

A. The entire punitive damages award should be sustained

The Supreme Court of Pennsylvania made clear in *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803 (Pa. 1989), that under Pennsylvania law the purpose of punitive damages is to "punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct." Thus, the district court reasoned that "[t]he jury determined the amount of punitive damages based on the nature of defendants' actions, not the theory of defendants' liability." App. at 1436.

The district court upheld the jury's verdict finding that the Swarovski entities defrauded E&R Co. The evidence supporting that finding encompassed all the defendants' outrageous conduct the jury heard about and saw at trial. The Swarovski entities engaged in a single scheme of fraudulent conduct that began before the time they entered into their contract with E&R Co. and ended at the time that E&R Ltd. discovered, after initiating this lawsuit, that the Swarovski entities were actually selling the line themselves, in violation of E&R's exclusive rights. Thus, even if the district court were correct that E&R Ltd. suffered no additional monetary damages as a result of the fraud, it is clear that E&R Ltd. continued to rely upon the Swarovski entities' fraudulent promises to E&R Co. Thus, the district court did not err in upholding the entire amount of the jury's punitive damages award.

If it were error for the district court to uphold the jury's award of punitive damages while setting aside the jury's finding of fraud against E&R Ltd., this Court should hold that the

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NOTES *(Continued)*

that the only claim on which it could return an award of punitive damages was E&R's fraud claim. *See* App. at 3580. Thus, the district court's ruling setting aside E&R's claims of tortious interference had no effect on the punitive damages award, because the jury was not told it could award punitive damages on the tortious interference claims.

district court erred in setting aside the jury's finding of fraud against E&R Ltd.

The only reason the district court set aside the jury's finding of fraud against E&R Ltd. was because the district court found that E&R Ltd. failed to introduce sufficient evidence that it suffered damage as a result of the fraud separate from the lost profits resulting from the breach of contract. *See* App. at 1414-15. This was an argument that the defendants failed to raise in the district court; accordingly, it was an improper basis for the district court to grant post-trial relief. *See Mallick*, 644 F.2d at 233.

Moreover, under Pennsylvania law proof of damages is not required to establish liability on a claim for fraud. *See Sands v. Forrest*, 434 A.2d 122, 124 (Pa. Super. Ct. 1981). The court in *Sands* wrote:

> In the first place, appellants' failure to prove damages was not determinative of the substantive issue of appellees' alleged liability for fraud and deceit. If plaintiffs were entitled to a verdict on the cause of action alleged, but were unable to prove damages, they were nonetheless entitled to a verdict for nominal damages.

Id. Thus, the district court erred in granting judgment notwithstanding the verdict on the jury's finding that the Swarovski defendants committed fraud against E&R Ltd.

Once the jury's finding of liability on the claim of fraud against E&R Ltd. is restored, it is clear that the jury's award of punitive damages must be sustained even under defendants' argument. The mere fact that only nominal damages would be available for the claim of fraud against E&R Ltd. does not undermine the jury's award of punitive damages, for the Supreme Court of Pennsylvania has held that a finding of liability without actual damages is sufficient to sustain a jury's award of punitive damages. *See Kirkbride*, 555 A.2d at 802-03.

B. Defendants' challenge to the sufficiency of the evidence to support the jury's punitive damages award is waived and without merit

The Swarovski parties' challenge to the sufficiency of the evidence supporting the jury's punitive damages award is waived. The Swarovski parties failed to challenge the sufficiency of the evidence to support an award of punitive damages in their motion for a directed verdict at the close of plaintiff's case, *see* App. at 969-74, in their supporting brief, *see* App. at 976-85, or in their "Renewal of Motion for Directed Verdict," *see* App. at 986-88. Instead, the Swarovski parties' objection to the jury being charged on punitive damages was limited to a challenge to the constitutionality of awarding punitive damages unrelated to the amount of actual damages.[24] *See* App. at 3484-86, 3583-84. Thus, any challenge to the sufficiency of the evidence to support the punitive damages award is now wholly waived. *See Mallick*, 644 F.2d at 233.

In any event, the jury unquestionably was entitled to view the Swarovski defendants' conduct, outlined in the "Statement of Facts," *see supra* at 7-14, as outrageous and deserving of punishment. Helmut Swarovski himself agreed that what the Swarovski entities did to E&R was "wrong" and "unfair." *See* Supp. App. at 25-26, 28-29.

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24. On appeal, the Swarovski parties have abandoned this argument.

EXHIBIT "C"

In its Brief, E&R fails entirely to satisfy this standard. E&R does not identify specific conduct by Swarovski that is "outrageous," nor does it demonstrate how that conduct was in addition to or different from that which supported the finding of fraud. Instead, it refers back to its eight page "Statement of Facts," the inaccuracy of which has been addressed above, *see* supra, Section II, and summarily concludes that there was outrageous conduct. This is clearly insufficient to support an award of punitive damages in any amount, much less in the amount of $16.5 million.

This appellate Court is constitutionally obligated to make an independent review of the punitive damage award both as to whether the evidence supports such an award in any amount, and if so, whether the amount awarded is greater than that reasonably necessary to punish and deter. *Pacific Mut. Life Ins. Co. v. Haslip,* 111 S. Ct. 1032, 1044 (1991). This action is particularly called for here in light of the trial court's defective *Haslip* review. In the face of a $200 million stipulated net worth for Defendants, the trial court upheld a punitive award amounting to 8.25% of that figure, which is far in excess of the usual court approved percentage.[18] In so affirming this award, the district court relied on an unsupported guess that the Swarovski's "extreme wealth" was "far in excess of the amount stipulated." App. 1436a (Opinion at 43). Further, the trial court compared the actual and punitive damages considering all claims and conduct, including the non-tort claims for which no punitive damages may be awarded. *Id.* And, in so doing, the trial court improperly compared the $16.5 million punitive award, not to the $850,000 in out-of-pocket damages, but to the $25 million award of lost profits, an amount which is clearly benefit of the bargain damages for breach of contract. *See Delahanty v. First Pennsylvania Bank, N.A.,* 464 A.2d 1243 (Pa. Super. 1983).

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18. "[A] typical ratio for a punitive damages award to a defendant's net worth [is] around one percent." *Cash v. Beltmann N. Am. Co.,* 900 F.2d 109, 111 n.3 (7th Cir. 1990).

Accordingly, the trial court's analysis failed to provide an effective and constitutionally necessary counterweight to the jury's wide discretion.

XI. THE DISTRICT COURT PROPERLY GRANTED JUDGMENT NOTWITHSTANDING THE VERDICT ON E&R'S TORTIOUS INTERFERENCE CLAIM.[19]

A. There Is Insufficient Evidence To Support E&R's *Tortious Interference With Existing Contracts Claim.*

The district court correctly recognized that Swarovski America, Ltd. could not, as a matter of law, interfere with the contracts of the other Swarovski Defendants.[20] In an attempt to defeat this holding, E&R disingenuously advances two arguments.[21] First, it states that "the evidence demonstrated that

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19. Sections XI–XVII are Swarovski's reply points as Cross-Appellee in No. 92-1723.

20. In addition to the claim of tortious interference with its existing Swarovski contracts, E&R also claimed that Swarovski interfered with its existing contract with Disney. The district court granted Defendants judgment notwithstanding the verdict on this claim as well, and E&R does not appeal that finding.

21. These two are in addition to the nearly ritual invocation of "waiver." Swarovski moved for directed verdict on the tortious interference claim. *See* App. 972a. This motion is sufficient to preserve the point that the Swarovski companies could not interfere with each *other's* contractual relations,

(continued on next page)

Nos. 92-1723
and 92-1746

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SWAROVSKI INTERNATIONAL TRADING CORPORATION, A.G., et al.,
Appellants and Cross-Appellees
v.
EBELING & REUSS, LTD. t/a EBELING & REUSS COMPANY,
Appellee and Cross-Appellant

RESPONSE AND OBJECTION OF THE SWAROVSKI DEFENDANTS/APPELLANTS TO THE MOTION TO STRIKE OF PLAINTIFF/APPELLEE EBELING & REUBS, LTD.

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RESPONSE AND OBJECTION

Plaintiff Ebeling & Reuss, Ltd. ("E&R") has moved to strike one paragraph from the Reply Brief of Appellants/Cross-Appellees filed on December 14, 1992, on the ground that it constitutes a "newly raised due process challenge to the jury's award of punitive damages on E&R's fraud claim". *See* Motion to Strike at 4, ¶16. Plaintiff's Motion is without merit. Contrary to E&R's assertion, the paragraph that it is moving to strike, which begins on page 31 of the Reply Brief, does not "newly raise" a due process argument, nor does it cite *Pacific Mutual Life Co. v. Haslip,* 111 S.Ct. 1032 (1991), for such a proposition, as Plaintiff claims.

The Swarovski Defendants original Appellants' Brief asserted that the district court erred in entering judgment on the $16.5 million punitive damages verdict because, among other reasons, the evidence was not sufficient to satisfy the applicable standard under Pennsylvania law for the imposition of such a punitive judgment. *See* Brief of Appellant at 46-48; *Tunis Bros. v. Ford Motor Co.,* 952 F.2d 715, 739-41 (3rd Cir. 1991). In its response to this argument, E&R chose to concentrate almost entirely on the contention that Swarovski had "waived" the sufficiency point and made only passing reference to its own inaccurate and incomplete Statement of Facts as support for the proposition that it had met the Pennsylvania requirements. *See* Brief of Appellee at 37. E&R apparently hoped that the Court would give only cursory review to the question of the sufficiency of the evidence to satisfy the punitive damages standard.

In their Reply, the Swarovski Defendants first demonstrated that there had been no waiver of the sufficiency point. *See* Reply of Appellants at 9. They then noted Plaintiff's failure to identify evidence sufficient to justify the $16.5 million award under Pennsylvania law. *Id.* at 30-31. Finally, Defendants noted that this appellate Court's own review of the punitive damage award to ensure that it meets the requisite legal standard – a review undertaken in *Tunis Bros.* and in decisions before and since – is itself important in saving a punitive damage scheme from unconstitutionality. *See Haslip,* 111 S.Ct. at 1044-45. In this regard, *Haslip* is cited to note that appellate court review in

the context of a challenge to punitive damages is not the small thing E&R tries to make it. As to the substance of Swarovski's argument, the Swarovski Defendants asserted the same argument in Reply as in the original Appellants' Brief – the award cannot stand when the evidence is judged against the applicable legal criteria set out in this Court's *Tunis Bros.* decision.

Since the Court hardly needs a Motion to Strike to deal with an argument raised for the first time in reply, *see, e.g., Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 204 n. 29 (3rd Cir. 1992), perhaps the underlying motive behind E&R's Motion is the recognition that it has never met Swarovski's argument on sufficiency and that it would benefit from the alternative requested relief of leave to reply again on the punitive damages issue. However, no justification exists for such a reopening in response to the Swarovski Defendants notation of the importance of appellate review to a scheme of punitive damages. The Swarovski Defendants do not say that the Pennsylvania requirements for punitive damages set out in their original Brief (p. 46) are unconstitutional under *Haslip,* they say that Pennsylvania's requirements were not met by Plaintiff's evidence and they seek this Court's review of that evidence in light of those legal requirements.

Accordingly, the Swarovski Defendants respectfully request the Court to deny the Motion to Strike of Plaintiff/Appellee Ebeling & Reuss, Ltd.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on all counsel of record via hand delivery on this the 24th day of December, 1992.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EBELING & REUSS, LTD. :
t/a EBELING & REUSS COMPANY, :
Appellant No. 92-1723 :
vs. :
SWAROVSKI INTERNATIONAL TRADING :
CORPORATION A.G.; D. SWAROVSKI & CO.; :
SWAROVSKI AMERICA LIMITED; :
SWAROVSKI AKTIENGESELLSCHAFT :
Appellants No. 92-1746 :

Transcript of tape-recorded oral argument in the above-entitled matter, held at the U.S. Courthouse, 601 Market Street, Philadelphia, Pennsylvania, on Tuesday, March 16, 1993. Transcribed by James DeCrescenzo, a Registered Professional Reporter and Notary Public.

BEFORE:

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THE COURT: We will hear argument in *Ebeling & Reuss, Ltd. v. Swarovski International Trading Corporation, A.G.*

Good morning, Mr. Byrd.

MR. BYRD: Good morning, your Honor. May it please the Court, my name is Michael Byrd and I'm appearing here today on behalf of the Swarovski appellants who were defendants below.

The four briefs and the appeal and the cross appeal of this case total about 170 pages, as I expect the court is fully aware, and if –

THE COURT: Yes, indeed. We're painfully aware of that fact.

MR. BYRD: If I have the time I still wouldn't have either the inclination or the intention of trying to touch on all of the points raised in those 170 pages.

What I want you to know primarily is that the plaintiff's case below consisted largely, if not entirely, of the testimony of Mr. Michael Russo, who was the president of the E&R division of Alco Standard Corporation in 1987, that's when he became the president, and who subsequently led the leveraged buy-out in 1988.

What Mr. Russo testified to was that by July 22, 1986, a contract had come into existence between Swarovski and E&R whereby Swarovski agreed to dedicate its injection molding process for the manufacture of miniature crystal figurines entirely to the production for figurines for E&R, and that it would do so, and this is a direct quote from Mr. Russo's testimony, "for as long as the merchandise was selling in the market and we chose to continue producing it and selling it."

These two points are crucial to an understanding of this case.

First, the notion that the exclusivity went to the technology, that it was a lock on the whole technology is the promissory fraud case. That is, that is what they argued. That's what the District Court found was the promissory fraud, that you promised us a lock on the technology at the time, that you didn't mean it.

And secondly, the second premise, that it was a contract to last for as long as the stuff was selling, is absolutely essential for

plaintiffs, both his breach of contract claim and the damages that supposedly flow from that, which were testified to, over a ten-to-twelve-year period.

It is our position that neither of those two notions or aspects can survive review, as a matter of law, based upon the record.

With respect to the duration, that the contract was for as long as this stuff is selling in the market, that is, as a matter of law, a contract of indefinite duration. The cases are absolutely clear that where the agreement between parties is we will go forward with this relationship for as long as it's selling, for as long as we want it, for as long as it's profitable, that is, as a matter of law, an indefinite duration. And where a contract has an indefinite duration, is a contract of indefinite duration, it is equally clear under both pre-UCC law and the UCC that it is terminable at will by either party.

So we do not have — this is not a proposition, in fact, which if you, if when the briefs are read carefully E&R denies. E&R says something really entirely differently. it says, Oh, this contract had a term. The jury necessarily found that it had a term because it returned a verdict and it returned damages. And then if you read both, and we cite them in the argument and the testimony and the brief, what is this definite term?

Well, maybe it was ten years or twelve years or five years; they could have found it was this. At one point in his, in his argument on damages, counsel says to the jury, Well, you found it has a definite term. I don't know what that term is. We have the party who proposes the contract that is supposed to have a definite term unable to identify it, nor is he able to —

THE COURT: Well, they say it's for the life of the product cycle.

MR. BYRD: Well, your Honor, that is not — life of the product cycle is the definition Mr. Russo gave, is the tag Mr. Russo gave to the notion that it is for as long as it's selling. That's the life of the product cycle. And that is not — two things, that is simply a shorthand way of referring to for as long as it's selling, first.

Secondly, there is no evidence, and this really leads directly into and is also an aspect of the sufficiency of the

evidence on lost profits, into the notion that there was no evidence of what that life of the product cycle would be.

That's not that it's ten-to-twelve years by understanding in the industry. It is literally how long would this product sell.

And that is by definition an indefinite term, not a definite one.

And again, it seems to me there really is no better evidence than that, than their attempt, the proponents' attempt to identify the term. They can't do it. They couldn't do it in the evidence, they couldn't do it in argument, and they can't do it in their briefing after the jury has come in entirely.

This is both I think a point on liability and a point on damages, because it is one of several really crippling defects with the evidence of lost profits.

First, we have the problem with the term, that it is clearly a contract terminable at will, not one for which you can get damages over the ten-to-twelve-year period that was testified to.

Secondly, heavily relied upon, both by Mr. Russo and by Mr. Cook and by counsel in argument as a basis for the lost profits damages was the fact of the Disney license, and that they were going to be manufacturing Disney product.

Yet the evidence in Exhibit 700, which is Mr. Cook's projection of sales, Disney sales are projected over a ten-year period ending at the end of 1998. Yet the evidence is absolutely clear that the Disney license, which appears in the evidence as Plaintiff's Exhibit 258, was a three-year license with a highly contingent one-year additional term.

So we have a contract whose term ended December 31, 1990 being used as the basis to project profits through 1998. As this court noted in its Tunis Brothers decision of last year, where a party also had a two-to-three-year contract, although there it was, it was an oral term and they wanted to project profits over a ten-year term because of their optimism about what could be accomplished, how long they were going to be able to do it, this court said, No, you can't do that. Two-to-three-year term, two-to-three years' worth of damages, that's what has to be, that's what has to be rewarded.

And frankly, the Disney problem is a double one, because it's not just that it's the number of years that are wrong. If the

court looks to what's pointed to, including what's pointed to in E&R's brief as the objective factors that support the huge projections, over and over and over again it's Disney. The number of people that go through Disney parks, the number of people that buy Disney figurines, they lean – Disney was, you know, it was their weapon, it was their crutch, at every point. And yet they went beyond the term for which they had a license and speculated.

THE COURT: Couldn't the jury infer that this would be a very successful venture?

MR. BYRD: Your Honor, we submit that there is not sufficient evidence from which the jury could infer that this would be a very successful venture. There is generally not the evidence from which they would be permitted, as a matter of law, to infer that Disney, which had given a three-year license, would extend it over a ten-year period of time.

THE COURT: Well, they don't have to infer as a matter of law –

MR. BYRD: Well, no, as a matter of law there is no evidence –

THE COURT: Can't they infer as a matter of fact –

MR. BYRD: No, they cannot infer from the facts that were presented to them in this case, your Honor, that it, that it would justify – the point about the matter of law was that where you've got the three-year license, that's what you have to base your damages on.

Further, generally, even if we grant the ten-to-twelve-year period, there was not the sort of evidence which the law requires in order to permit the calculation of lost profits damages. We accept utterly the notion that you cannot have, you know, entire accuracy or – you know, in assessing lost profits damages necessarily, that some uncertainty is clear, and is going to have to be tolerated, and E&R cites the Pennsylvania Supreme Court's decision in Spang and where there they note that you're going to have some uncertainty and that entire accuracy cannot block recovery when someone has in fact been injured.

But there are two other aspects to the Spang case that also appear in this Court's Advent and Tunis Brothers decisions that are overlooked.

The first is, and this is from Spang, that the plaintiff in an action for breach of contract has the burden of proving damages resulting from the breach.

And the second is that what the law does require in cases of this character is that the evidence shall, with a fair degree of probability, establish a basis for the assignment of damages. Here that –

THE COURT: Well, what else were they going to do here?

MR. BYRD: Well, your Honor –

THE COURT: I mean they have an expert come in that made projections. If you're going to have lost profits, you've got to have projections.

You say the expert ignored the actual operating results. But they say, Well, those were tainted by late deliveries from your client and by these letters that your client allegedly wrote to, well, Mr. Metcalfe wrote to all our customers.

MR. BYRD: Well, this Court in Advent noted that, that what a plaintiff can do – noted from the Pennsylvania Supreme Court three ways it can be done: It can be done on the basis of past profits; it can be done on the basis of similar contracts if the circumstances are sufficiently the same; and it can be done by the opinion of experts if it's based on something more than, than opinion or speculation.

And in none of these three cases was that done. The projections that Mr. Cook used, and simply took off from with no explanation given as to where he went from three years to the ten to twelve that he used, were projections which, as we note in our brief, came from Mr. Russo's testimony. If you look at what Mr. Russo did to arrive at those figures which were done for his presentation to the Swarovski board, he said, and it's almost the call-me-a-taxi theory, the old joke "Call me a taxi. Okay, you're a taxi."

He said this line is going to replace the Hummel line, which we have lost. Despite the evidence that the Hummel line was the mainstay of our business, that it accounted for as much as 50 percent of our sales, that according to Plaintiff's Exhibit 8, which

they introduced, a survey of retailers of giftware as an indication of what are and are not popular lines, Hummel is the second most popular collectable line that there is. Despite all of that, what Mr. Russo said is this will replace Hummel. Therefore, the first year it will sell to half the Hummel retailers, the second year, 1988, it will sell to five-sixths of them, and by the third year, 1989, it will be selling to all 6,000 of our current Hummel retailers.

There was no evidence at all of any use of reference to the roll-out of new products. There was no evidence as to what new figurines do or don't do or how they develop, how they are marketed, what their history is.

It was We were previously selling one of the most popular lines of the century. It was the mainstay of our business. We have lost it, this is replacing it. Therefore, this will reach the Hummel level.

At one point in their brief they cite as an objective factor, which is one of the things that this Court requires if you're going to make these kind of projections, they cite to Mr. Cook's testimony when he was asked "Are you saying this is going to outsell Hummel?"

He said "Oh, oh, yes."

"And what's your evidence of that?"

"Well, they couldn't get enough Hummels. E&R couldn't get enough Hummels to sell."

THE COURT: Let me, if I might, try to help myself distill the issue. As I understand it then, you are suggesting that the underlying basis for the expert's testimony was flawed, but not that given the testimony that the jury's – the jury may not have reasonably concluded as it did, are you?

MR. BYRD: Well, first that, that it was flawed; that it was throughout, from beginning through to the end, pure conjecture. These numbers were –

THE COURT: Well, if an expert provided specific detailed information upon which a jury might reach a conclusion, then is that inviting speculation in the verdict as to the amount? Or are you attacking the basis for the expert's testimony as having been unfounded under, I believe, Advent?

MR. BYRD: We are attacking the basis of the expert's testimony as amounting to nothing more than individual opinions or conjecture.

THE COURT: But isn't that a different issue than the question of whether or not under the circumstances the jury's conclusion was not – the jury may not have reasonably inferred a specific amount?

MR. BYRD: The jury has to infer the amount from sufficient and appropriate evidence. As in Advent, the jury came up with an amount. What this Court said was that the evidence it had from which to come up with this amount was not based upon sort of underlying criteria that are required.

THE COURT: All right.

MR. BYRD: Beyond the issue, what E&R says in response to this is the thing I think, your Honor, Judge Stapleton suggested. It was all flawed because of our action.

Yet, there is no identification, as frankly the trial court recognized, of exactly what sales were lost because of the Metcalfe letter, which is the action identified as, as the great wrong. There's no suggestion in fact of any ultimate sales or figures on ultimate sales.

You can read the record from cover to cover, and there is no evidence that anybody actually has one of these things at home on his or her mantel or on a shelf.

Ultimate sales, how it was received in the market, the real market, absolutely no evidence submitted by plaintiff in that regard at all.

THE COURT: Did appellant object to the basis of Cook's expert testimony?

MR. BYRD: Yes, your Honor. The, the – and not only to his expertise, but also to the basis of his testimony. Was raised not only at the time, it was raised in the motion for directed verdict, it was raised in the renewal, it was raised in all of the posttrial actions.

There is here – certainly a man got on the stand and testified as an expert to very large numbers. Just as a man got on the stand in Advent and a man got on the stand in Tunis Brothers and testified to very large numbers. And the jury came back with a large number.

What is true here, as it was true in Advent, as it was true in Tunis Brothers, was that it was in fact nothing more than testimony of an expert, based on nothing more than individual opinions or conjecture, and that is not adequate under the law of this court.

With respect to Mr. Russo's point about the lock on the technology, beginning with Plaintiff's Exhibit 12, which was the Kurt Mignon to Steven Palmer 1986, March 20th of 1986 telex, and continuing through all of the draft contracts which Mr. Russo testified on his examination were an attempt at E&R's suggestion to document the July 22, 1986 contract, it is clear that there was no lock on the technology being discussed.

The Plaintiff's 12 is limited to an exclusive on the above-mentioned items. Mr. Russo said then in 1986, this is his-testimony, "We wanted to document this contract."

There are in evidence three contracts. They appear – draft contracts, they appear as Plaintiff's Exhibits 239, 259 and Defendant's Exhibit 357.

None of them have the definition of product or exclusivity that is a lock on the technology. All are limited to products designed by E&R.

When this case was originally brought in 1988 it had what is Defendant's Exhibit 357 attached to it as an exhibit. And what it sought was to compel execution of that contract with that provision.

There is simply nothing in the contemporaneous record, in the effort to document it, that indicates that there was any promise made for a lock on the technology. Yet that's the sole basis for the fraud and for all of the damages that allegedly flow, punitive damages that allegedly flow from the fraud.

We would note, particularly with regard to Plaintiff's Exhibit 259, part of it is an actual cover letter from a lawyer for Ebeling & Reuss that was then part of Alco. It says "Here's the draft contract containing the suggested changes by Ebeling & Reuss." And the definition of product, the definition of exclusivity being limited to E&R-designed product is absolutely unchanged.

It is exactly what Swarovski has contended that it was: It is limited to product of their design and not a lock on the technology.

With regard to the punitive damages –

THE COURT: Why isn't the issue of whether the – of the District Court, whether the District Court properly declined to reduce the punitive damage award waived? Why isn't it waived?

MR. BYRD: Excuse me, your Honor. It is not waived in any respect. With respect specifically, the issue was raised as to the excessiveness of the punitive damages posttrial by a motion to alter or amend. We appealed saying that the court erred in denying the motion to alter and amend, that the evidence doesn't justify both – first of all, one thing that couldn't be waived is that, having gotten rid of all the other tort claims, the court should not have affirmed the punitive damages entirely on the basis of the one that was left, which is a question of law.

And secondly is whether the evidence introduced justifies this amount of punitive damages, which was consistent argument, that the motions for directed verdict go to all of the tort claims, the – after the verdict came in with the amount of punitive damages, a motion was made to alter and amend based upon the fact the 16.5 million in punitive for this fraud, in addition, of course, on the trademark and trade secret, was unjustified. That was, that was denied, and it was appealed from saying that the court should have granted the motion to alter and amend.

Now I guess their argument is that because there was no – we wouldn't be entitled to a render because the motion for directed verdict does not specifically say there is no evidence on which the jury should award punitive damages.

It does, however, as to every single element of fraud, say that there is no evidence in every single tortious action, say that there is no evidence to justify it.

We weren't, by the way, trying to interject suddenly in our reply some constitutional issue. We were noting, which is a matter that has been raised, what we were noting was that the Court here, as it has recognized in its cases, and as Haslip has given constitutional dimension, has its obligation to review the punitive damage award.

Judge Shapiro reviewed it, she went down the checklist. It's just our position that she reached the wrong result and the justification of $16½ million, based upon the facts of this case, particularly since all of it rests on this promissory fraud, that frankly doesn't exist and has no support and is so greatly in excess of the actual out-of-pocket damages.

THE COURT: With respect to the – pardon me. With respect to the trademark case, did the court determine "crystal signatures" to be descriptive, as opposed to generic? suggestive? arbitrary?

MR. BYRD: That's – I'm not, I'd hate to be absolutely certain on, on that point. I – obviously it is not. "Crystal" is generic. "Signatures" I do not believe she found to be descriptive.

I, I don't know that she went further and found it to be arbitrary. I think the Court's point there was that you have "crystal signatures," you have "crystal collectables." The only similarity between the two is "crystal." "Crystal" is generic. There is a generic component; there are two other components. Frankly, of the two, the descriptive one seems to be "collectables." But that the only thing you can do is decide can you be "crystal" anything and not conflict with "crystal signatures," given the difference between "signatures" and "collectables."

THE COURT: Right. But don't – I understand you to be arguing that one of the reasons the judge was right about trademark was that there was no secondary – not only was there no secondary meaning shown, the Court didn't even charge on secondary meaning.

MR. BYRD: That, that is correct. They, they suggested that there was a finding of secondary meaning on trademark. But in fact there was no charge on, on secondary meaning in trademark.

THE COURT: But, but if it was suggested that they don't need any, wouldn't that explain why the judge didn't charge on –

MR. BYRD: Well, your Honor, the Court did charge on secondary meaning with respect to trade dress. I think perhaps the Court didn't charge on secondary meaning because it's a

registered mark, and I don't believe that they requested a charge on secondary meaning with respect to trademark.

THE COURT: All right. We'll get you back on rebuttal.

MR. SCHER: May it please the Court, my name is Howard Scher, and I'm appearing here on behalf of Ebeling & Reuss, the plaintiff below, appellee/cross appellant here.

I did not hear the appellant reserve for rebuttal. But in the event there has been a reservation, I would like to reserve two or three minutes on surrebuttal on the cross appeal issues only.

THE COURT: Well, I think we'd like you to say anything you have to say about either of them while you're up there.

MR. SCHER: That's fine. Yes, I will. First let me say that the — this case is a case which involves the destruction of a 100-year-old Philadelphia business. It was a Philadelphia business that had been founded in the 1880s. Its destruction literally, economically, was the result of the actions and conduct on the part of a group of corporations, European Swarovski companies, and an American Swarovski company called Swarovski Company Limited, SAL. It's referred to in many of the documents.

There was sufficient evidence presented to the jury to show that Ebeling & Reuss had staked its financial future on the promises made by the Swarovski defendants, the European Swarovski defendants, and the evidence demonstrated that Swarovski had no intention of keeping its promises when they made them.

Plaintiff's Exhibit 594, and it's in the record at page 4485 in the appendix, the reproduced appendix, has in it paragraph 5. This is a letter that was originally in German and was written from — internally at Swarovski from a Mr. Mignon, Kurt Mignon to a Mr. Helmut Swarovski, both of whom were actors and very significant actors.

In fact, Mr. Mignon came to the courtroom and testified. Mr. Swarovski did not. And Mr. Mignon writes and says "Since we do not wish to exclude the possibility, particularly if this is successful," and that's referring to the exclusive distribution of this product line, "of taking over sales of pressed figures ourselves some day, it is particularly important to inform E&R that our cooperation concerns only the specific series or number

of series stipulated and that from this initial cooperation no claims can be made, that for any future time Swarovski must market its pressed articles, non-cut crystal, through E&R. Helmut, I think this point is particularly important given American law."

That letter was dated in January of 1986. Negotiations ensued which resulted in the agreement. The agreement was to form an exclusive distribution agreement for the Swarovski-manufactured unfaceted crystal figures for the life of the product line with a minimum term of five years.

The evidence of the, of the product line, that is that that was the term, is all – not all over the record, in a number of documents that were presented at trial. And I should comment at this point, while there was testimony, live testimony of Mr. Michael Russo as a fact witness, and of course Mr. Cook, who was the expert on damages and presented no fact evidence, there were 150 documents presented to the jury. The jury had jury books containing the exhibits, as the defense counsel took advantage of that as well.

The jury had 150 Plaintiff's Exhibits before it, when it made its deliberations, while the presentation was made. They had the depositions read from witnesses who were out of the courtroom, Mr. Helmut Swarovski, whose deposition was taken in Austria –

THE COURT: Well, we realize –

MR. SCHER: I'm sorry.

THE COURT: – they had a lot of evidence.

MR. SCHER: Lot of evidence. Okay.

THE COURT: Because the trial went on for some time.

MR. SCHER: Yes, your Honor.

THE COURT: But they say the promise was not exclusivity with respect to the technology, but that every draft of every contract draft that they discussed limited it to figurines designed by E&R.

MR. SCHER: I think it's important to note that the contract was implemented, that it began working, in 1986. In the summer of 1986 Ebeling & Reuss issued purchase order number one. It only issued that after the deal had been struck. That is, there were many writings exchanged between the parties which

said exclusivity, product line, all of the elements that we're talking about here.

THE COURT: What does "product line" mean, in your understanding?

MR. SCHER: The smooth rather than the cut unfaceted crystal figurines that are manufactured by Swarovski. That technology may have uses other than what I just described. We never thought we bought that technology. What we did buy was the Swarovski manufacturing skill in creating uncut, smooth figural objects, fanciful objects. We knew that we had that as our agreement.

If I may continue, your Honor. It was not until June of 1987, we're talking a full year later, that the first draft integrated contract appears. That first draft integrated contract appeared after the Metcalfe letter, after the internal decision to revoke the right to use the name, after Alco Standard Corporation made its only, one and only appearance in this case – in this situation. And then and only then was a draft integrated contract sent to Alco Standard Corporation's counsel, who marked it up. And one thing they did add was a ten-year term. And of course the defendants had no objection to the ten-year term. And it has held there. Swarovski did not sign it. No one ever signed that agreement.

So while that, while that agreement was presented to the jury as being dispositive of any claim of exclusivity, and the defendants argued forcefully that this jury should not return a verdict in favor of Ebeling & Reuss on the exclusivity issue, the jury rejected that argument because it believed that the agreement had been struck in 1986 and it believed that when it saw Plaintiff's Exhibit 71, which is a document that is contained in a supplemental appendix.

And it says, at page 129 SA, in supplemental appendix, the inauguration collection of 50 objects will be expanded by at least 40 new designs a year for the next five years. And that was a document that was presented to the jury, but of course it had been presented to the Swarovskis in Watens, Austria, and they

had specifically approved each and every element of this presentation, as well as another presentation that occurred in October of '86, long before the first draft integrated agreement ever surfaced.

So the draft integrated agreement is evidence, no question, and they used it as much as they could, no question. But it was rejected by the jury; there's no question about that either.

The profit projections, I heard Mr. — I heard some time spent on that, and if I could just respond briefly.

Your Honor, Judge Stapleton, you recently decided the case of American Medical Imaging, which is a fire-loss claim, case involving fire loss. I know you're intimately familiar with it. And what it does is review the kinds of evidence that a claimant for future-profit award can come up with. Obviously there are some limitations on predicting the future. But your Honor commented in that — in that case the plaintiff had made profit projections prior to the loss, and those profit projections were employed by the expert to further project the possible losses that would occur.

And your Honor commented that the quality of that evidence, the quality of those kinds of projections was perhaps higher than the typical projections of an expert who comes in after the harm has been done and tries to reconstruct what might have happened.

Well, those kinds of projections, that is the kind that were made at the time, before the loss occurred, at the time when everyone believed that there would be full cooperation in the relationship between the parties, those projections were made in this case by Mr. Russo. Those projections, those profit projections were presented to the Swarovskis in Watens, Austria at the same time as this other material was presented.

And those projections were adopted by the Swarovskis six months later while they were evaluating what the consequences of repudiation and revocation of the agreement might be. And they said this, this has, this appears to be a very profitable arrangement. These are the profit projections that are anticipated. And it was those profit projections that Mr. Cook employed. But that's not all he employed. And he employed, he employed evidence of, from the industry, he reviewed evidence

from other witnesses, other people on whom he relied on which experts are entitled to rely to develop his profit projections.

He also relied on Disney material and, yes, there was much made of the Disney material and, yes, Mr. Cook did investigate thoroughly financial projections made by the Walt Disney Company as to what they expected the profitability and the expansion of the market of Disney-licensed figurines to be. And he did use that information.

I might note, your Honor, that there is a problem — your Honors, there is a problem in the assembly of the appendix, through no one's fault, but the court reporter had — there was a break in Mr. Cook's testimony that doesn't make any sense of it. It occurs just before lunch and there — it doesn't seem to pick up again. And what happens is that that transcript, Mr. Cook's testimony is disjointed as a result. At page 2371A Mr. Cook's testimony picks up again — it may be 2378, and it's in that direct examination, that's the balance of the direct examination of Mr. Cook that I think perhaps, perhaps some of the confusion exists. It has the full exposition by Mr. Cook as to his investigation.

Mr. — my adversary noted that the loss of Hummel was a grave and devastating loss and suggests that the profit projections were unreasonable since Ebeling & Reuss was seeking to replace what had been reported in a magazine article as the second-most-popular figurine in world history or in American history.

Hummel was the second-most popular, but what my adversary failed to note was that the third-most popular was Swarovski-designed crystal figurines, and the fourth-most popular was products distributed by Ebeling & Reuss.

So what Ebeling & Reuss saw as the replacement of Hummel was the combination of the Swarovski unparalleled design and quality with Ebeling & Reuss' unparalleled distribution skills to create, yes, a replacement for the Hummel line. And the jury was convinced that that success could have been achieved, had the promises which were made been kept.

THE COURT: What about the argument that you're limited, your damages are limited by your license from Disney?

MR. SCHER: Your Honor, the – every profit projection makes projections of the continuation of relationships, except for the relationship between the litigants.

What Tunis is talking about is whether Ford and Tunis could make a profit projection of ten years when Ford and Tunis had an agreement for two or three years. That's what the record indicates. They weren't sure which it was.

It's not a question of whether Mr. Tunis could make a projection as to the continuing availability of supply or outlet for its products with one of its customers. They're talking about Tunis and Ford. That would be had there been an agreement between Ebeling & Reuss and Swarovski which was of two years duration, we could not argue that the duration extended beyond the two years. We could not make profit projections beyond that two-year period.

But that's not the situation here. The Disney contract is merely a bit of evidence as to a basis upon which a future profit projection can be made.

They argued to the jury that they could expect the Disney contract to expire at the end of three years and never be renewed. We offered evidence by deposition testimony of Aviva Gordon from Disney who said it was a wonderful product, it was beautiful, she was dying to have it marketed and it would go on forever, whatever words they used. But they were certainly contrary to an expectation that it would, that the moment the license came to its end, it would be terminated. Certainly that was not a – not the case.

THE COURT: Let's go to – the jury awarded $16.5 million in punitive damages. You would agree with me, I think, that under the controlling law, even where you're talking about a fraud claim, there's got to be fraud plus something –

MR. SCHER: Your Honor –

THE COURT: – in order to recover punitive damages. Now what is the plus here? I mean they were trying to make a buck. Now maybe they cut a corner, but why 16 – if they collected all this money in compensatory damages, 25 mil, what is it that deserves the 16.5?

MR. SCHER: Let me first say, one, there is no question that this record has no directed-verdict motion at the close of

plaintiff's case suggesting an absence of outrageous -- outrageousness element.

The only preservation of the punitive-damage point that could be arguably made is a comment made in the charging conference where defense counsel says "I'd like to reserve the constitutional issue" and the judge says "It's reserved." I don't know exactly what that means, but "the constitutional issue" does not mean there is insufficient evidence of outrageous conduct upon which a punitive damage award can be made.

That would not be adequate under Rule 50, in my estimation. But that's not even here. If you examine the motion for directed verdict and the brief in support thereof, you will find no evidence of a challenge to the quality of the evidence presented on punitive damages. It is unassailable by this Court.

However, after the fraud, the January 28, 1986 letter, after that, that is the fraud. After that, that fraud scheme in the face of Ebeling & Reuss --

THE COURT: I'm sorry, which letter?

MR. SCHER: The first letter I referred to, which was 4485 is the paragraph. It's Plaintiff's Exhibit 594, January 28, 1986, three or four or five months before the contract went into effect. After the contract went into effect -- between the time of that letter and the time the contract went into effect, Swarovski learned that Ebeling & Reuss -- and the jury heard -- was staking its financial future on the distribution of this line. Swarovski learned that Ebeling & Reuss had lost its major product, through no fault of its own, and had a 5,000 -- 14,000-store distribution network available to, to use for another product.

They had choices of other products. They relied on Swarovski's promise that they would have exclusive distribution of this particular product line.

In the face of that, knowing that, Ebeling & Reuss had staked its future on the distribution, the exclusive distribution.

Swarovski went on to, the European Swarovskis went on to, number one, fail to deliver in a timely fashion; number 2, authorized the mailing of the Metcalfe letter. And that Metcalfe letter is nothing if it's not a letter suggesting that Ebeling & Reuss, a 100-year-old Philadelphia distributor, is purveying

counterfeit material. Those words are not used but the implication is clear. You send that to a collector that says there's doubt about the authenticity of these products, a collector will not buy the first in the series of the collection, much less the second.

THE COURT: We're talking about fraud in the inducement of the contract?

MR. SCHER: Yes. That's the fraud. And the outrageous conduct is the implementation.

THE COURT: What's the Metcalfe letter got to do with fraud in the inducement of the contract? I'm missing something.

MR. SCHER: Well, your Honor, the outrageousness, which I submit is not part of this case, but the outrageous conduct is, is the, the extra things that are done to exacerbate and aggravate the fraud that was at the outset. Had they simply reserved to themselves the right to distribute the product, which is what the fraud is, there would have been no punitives, no punitives available.

They simply reserve to themselves, some point in time they announce their intention, We had always intended to reserve to ourselves, You've been defrauded, Good-bye. And that – and under the UCC one would get expectancy damages as well as reliance damages, but that's the end of it. No punitives.

What happened here was more than that. What happened here was, number one, the dependence of Ebeling & Reuss known to Swarovski, number two, the Metcalfe letter. Why, if they had reserved to themselves the right to distribute this product themselves, why did they have to destroy Ebeling & Reuss' credibility in the marketplace by suggesting they were purveying counterfeit material? Why did they have to take the information regarding the possibility of Zales, distribution to Zales, and, and take it for themselves? Why did they employ a negotiating strategy to try to euchre from Ebeling & Reuss the rights that they knew Ebeling & Reuss had through a negotiating strategy, which included this draft integrated agreement.

The draft integrated agreement was part of their negotiating strategy to try to get back from Ebeling & Reuss the right to use the name and to try to confine Ebeling & Reuss to only nine articles or only certain limited articles, rather than the entire figural line.

And then there's the project concept memorandum, it's P-260, I believe, which is a memorandum – which is a document prepared in German. We have the translation. It was presented to the jury, where it shows that the, the Swarovski defendants, the European Swarovski defendants used the know-how provided by Ebeling & Reuss to their own advantage.

So they – this is further in pursuance of their original scheme, which was take back, when it looks like it's going to be a success, let's take it back and use it for ourselves.

These are the kinds of outrageous conduct that, that were evident to the jury and upon which the jury based its punitive-damage award.

And as I point out, the outrageous element of it has been, was eliminated – was not preserved for purposes of appeal.

THE COURT: The trademark claim, why did the judge not charge on secondary meaning?

MR. SCHER: It was a trademarked – "crystal signatures" was trademarked. She concluded that there could not be infringement because the word "crystal" was a generic term and the word "signature" was a generic term and the word "crystal" and "collectables" were generic terms.

But as your Honor, Judge Roth, decided in the Burner case, that Air Door, two terms which are generic separately, put together are no longer generic. And therefore, the judge's reversal of liability on the trademark claim should be reversed. That is, that she took it away from the jury should be reversed. It was not, as a matter of law, improper for the jury to find liability on the trademark claim.

THE COURT: But how could they find secondary meaning without having been charged on it?

MR. SCHER: The – well, your Honor, they –

THE COURT: Your argument, I understand, is that they were charged about secondary meaning with respect to the trade dress.

MR. SCHER: Yes. And they –

THE COURT: And somehow they were supposed to define, you think they divined in their own mind that they were supposed to address secondary meaning in terms of "crystal signatures"?

MR. SCHER: I think they were given evidence on which to base that conclusion, that there was secondary meaning and the — we presented to them two. We presented to them evidence of the secondary meaning, that is the confusion that would result from, from the presentation of the two articles. We just presented to the jury what those two articles looked like, what a crystal collectable knockoff looked like, as compared to a crystal signature figure.

And the confusion as to the source of the, of the material and the other, I think it's *Ford v. Summit* line of evidence that is required in order to show confusing similarity. And we did present evidence in support of that, and I think the jury's verdict is a result of the evidence that we presented.

THE COURT: What exactly was the trade secret?

MR. SCHER: The trade secret — well, we could say the marketing prowess and know-how, but specifically in the project concept memorandum, I'll find it in two seconds, it says Ebeling & Reuss, at page 417 — I'm sorry, 4176A, it says "Ebeling & Reuss gave here unintentional support," meaning they've given us something they didn't realize they were giving to us. In a business reply mail operation Ebeling & Reuss received approximately 8 percent of the cards back; a figure of 2 percent is indicated as a good response.

They'd used our market survey to create their own competitive crystal collectable line. We gave them the results of our market survey, in that P-71 document to which I made reference earlier in the presentation, we made in the fall of 1986, because we were convincing our manufacturer of how effective a distribution job we were doing because we believed we had the exclusive rights to distribute this line and that there would be no use of our information to compete directly against us. We had an expectation of confidence with respect to the provision of that information.

As it turns out, unintentional support was given to Swarovski by the provision of that information, and that is simply trade-secret information that is — I believe it's even within the definition of the statute, the plain meaning of the statute. It is the results of a market survey which shows the receptivity that

this product, theirs being the copy of crystal signatures, would have in the marketplace.

That kind of information is crucial to know in advance of the kickoff of a new product line, and that's the very information that they took from us unwittingly, concededly, knowing that it was unwitting.

If I may turn to the tortious interference claim. Well, first of all, the light's red. May I continue just briefly, your Honor?

THE COURT: We'll give you two or three more minutes. Go ahead.

MR. SCHER: I think the waiver issues are very important in this case. I believe under, under the established law in this circuit, and it is very-well established, I don't need to recite the cases that start with Lowenstein and go up to Fineman.

The failure to file a motion for a directed verdict on the promissory estoppel claim eliminates any possibility that that promissory estoppel claim is not unassailable. That's $25 million plus $850,000 in reliance damages, unquestioned. There is no basis upon which that part of the case can be overturned. An investigation of the contract and its duration and all that other is moot. It will lead to no change in the verdict because the promissory estoppel claim is unassailed.

On tortious interference, your Honor, there was no preservation of any point that would suggest that there is a, a tortious — a corporate veil-piercing doctrine that entitles a defendant who has been accused of perpetrating a wrong to decide to eliminate the veil of its corporations so as to avoid tort liability. There's no case in Pennsylvania that's ever recognized the affirmative use by a defendant of the corporate veil to take on and off to avoid tort liability.

The Kiehl case, the Sams case, all the cases that are cited in our brief are supportive of that proposition, and therefore the Court below — I'm sorry, the District Court, was in error, as a matter of law, in overturning the tortious interference liability determination, as a result of which the $8 million reputation loss needs to be restored to the verdict. And as to the —

THE COURT: I'm going to have to cut you off here. Was there time reserved for rebuttal?

MR. SCHER: Your Honors declined to avail me that opportunity. Thank you. It will take me a second to reassemble.

THE COURT: I do note the clerk is reserving five minutes for rebuttal, but I forgot to tell you.

MR. SCHER: Oh, I see. All right. I didn't realize you weren't directing that question to me.

MR. BYRD: Thank you, your Honor. If I could turn very briefly first to the points as to which we are appellee. With respect to the suggestion that there's, sort of there's no theory of law that permits the related nature of parties to be taken into account in determining liability for tort, that's clearly not true. It's not true in the area of tortious interference.

The cases which they cite, the Kiehl case and the Sams case, Kiehl dealt with the issue in the workers' comp statute in Pennsylvania, whether if someone were an employee of the sub, would the workers' comp prevent him from suing a parent.

The Sams case dealt with the condemnation statutes having to do with whether parents and sub are the same owner of adjacent tracts for various arcane condemnation purposes.

The law of Pennsylvania, as recognized by this Court, is that when it comes to tortious interference, whether parties are related is a legitimate consideration and to whether or not there could be tort liability.

Here, frankly, we have an extremely unusual situation in that the – it was stipulated and it was instructed at plaintiff's behest by the District Court that a single board is the executive authority, the organization that made the decisions for all the corporations that are defendants in this case.

I mean the Court, realizing that, when in the midst of the charge conference she understood finally that plaintiff really did want a charge on, you know, inter-Swarovski tortious interference, she said, Well, how can this possibly be in light of your, your request, your argument that a single board makes all of the decisions for all of the companies? In effect interfering with themselves.

She submitted it anyway, but this was her immediate reaction when she realized that that was what they were asking for. And consequently she entered the N.O.V. on that basis.

With respect to the harmed reputation damages, what that evidence was, the $8 million was apparently, from the testimony, the amount that Alco had invested in E&R, as it was shown on the books of E&R before it was sold.

We have noted to the Court the AM/PM case from the Pennsylvania Supreme Court as to what you have to prove to get loss of reputation damages. You have to prove –

THE COURT: Before it was sold, or before it went into bankruptcy?

MR. BYRD: Before it was sold. It's a Smith Barney report which is being done, I think, as part of the effort to sell it in 1988. For that purpose the – also, there is no evidence that all of that value would have been lost when it went into bankruptcy, because Mr. Slimmer, who was E&R's banker, testified that there was actually enough value in E&R to pay off his $3 million debt at the time of the trial.

But more significantly, it is clear in Pennsylvania that it really is lost sales in other areas that is what you have to prove. They, they cite in their reply brief the Miller oral surgery case for the proposition that you can somehow consider equity value.

In fact, equity value was, as the Court writes in that case, a term used by the expert to describe lost future sales. It's absolutely clear that that's what the law is.

With respect to what trade secret, the trade secret finally comes down to the fact that it was going to be popular. Well, if it was what we took, I guess we're here a little in the, in the status of someone who's a recipient of a false tip.

But it is, in any event, certainly something, the popularity of an item in the industry is something that the selling of it would make clear, if it was true or not.

And it's absolutely clear that if by marketing the stuff you reveal the secret, there is no secret. We have noted in our brief the points at which –

THE COURT: Are you saying a marketing survey can't be a trade secret?

MR. BYRD: I'm not saying the marketing survey can't ever be a trade secret. All we have here is that it looked like from initial response – what they're saying is it looked like from initial responses, from post cards, it was going to be popular.

That's it. I mean not What kind of things do you like? What kind of the – you know, How should we do it? That's a hundred percent of it. That's the whole secret.

And, and that fact as the basis for, you know, an award of any, of any damages, much less 2½ million in punitive, is unjustified. Further, as we note and as the District Court found, there isn't any evidence of actual damages.

They actually sought to reopen the record to put on trade secrets, lost profits, Zales profits damages, the stuff Swarovski got. And the Court said that "The trial's over." They recognized at the time they didn't have any evidence of that in, in the record.

With respect to the trade dress, almost all the money they're talking about, they're expenditures, you know, the cost of producing cases and things like that. There's no evidence of the sort of dissemination of this information to the public such that – and again it's important to remember that the confusion you're talking about is that someone would be confused as to the source of the Swarovski crystal collectables, thinking that it emanated from the same source as crystal signatures.

There is no evidence of identification of the trade dress, and I guess the ultimate irony in this case is the evidence is the trade dress was primarily Swarovski's to begin with, what Swarovski said was and Mr. Russo testified, You use our canisters, You use our foam. It's, it's a bizarre effort in fact to claim a trade dress right on E&R's part and what was Swarovski's to begin with.

Thank you.

THE COURT: Gentlemen, would you go by, on your way out would you go by the clerk's office and arrange for a transcript to be made of this morning's argument to help us in considering this case. You've been most helpful, and it is a large record, and counsel were certainly well prepared, and we appreciate your help.

(Argument concluded.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1723 & 92-1746

EBELING & REUSS LTD. t/a
EBELING & REUSS COMPANY,
Plaintiff/Appellee/Cross Appellant,

v.

SWAROVSKI INTERNATIONAL
TRADING CORPORATION A.G.,
D. SWAROVSKI & CO.,
SWAROVSKI AMERICA LIMITED, and
SWAROVSKI AKTIENGESELLSCHAFT
Defendants/Appellants/Cross Appellees.

ANSWER OF APPELLEE/CROSS APPELLANT EBELING & REUSS, LTD. TO PETITION FOR REHEARING AND REHEARING IN BANC

On Appeal from a Final Judgment
of the United States District Court for the
Eastern District of Pennsylvania

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. THE PANEL CORRECTLY HELD THAT SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE CONTRACT BETWEEN EBELING & REUSS AND THE SWAROVSKI DEFENDANTS HAD A DEFINITE DURATION	2
II. THE PANEL CORRECTLY REJECTED THE SWAROVSKI DEFENDANTS' STATUTE OF FRAUDS ARGUMENT, WHICH IS BOTH WAIVED AND WITHOUT MERIT	5
III. THE PANEL CORRECTLY HELD THAT SUFFICIENT EVIDENCE SUPPORTS THE JURY'S AWARD OF LOST PROFITS	9
A. The Disney License	10
B. E&R's Damages Expert	11
IV. THE PANEL CORRECTLY UPHELD THE JURY'S PUNITIVE DAMAGE AWARD	16
V. THE PANEL'S JUDGMENT ORDER IS NOT CONTRARY TO THIS COURT'S INTERNAL OPERATING PROCEDURES	18
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983) 21

Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) 5-9, 11-15

American Medical Imaging Corp. v. St. Paul Fire & Marine Ins. Co., 949 F.2d 690 (3d Cir. 1991) 11, 15

Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153 (3d Cir.), *cert. denied*, 493 U.S. 993 (1989) 6

Browning-Ferris Indus, v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 21

Cash v. Beltmann N. Am. Co., 900 F.2d 109 (7th Cir. 1990) 22

Dunn v. HOVIC, No. 91-3837 (3d Cir. Sept. 18, 1992), *vacated upon grant of reh'g in banc*, (3d Cir. Oct. 8, 1992) 21

Ebeling & Reuss, Ltd. v. Swarovski Int'l Trading Corp., 866 F.2d 1409 (3d Cir. 1988) (table) 2

Fineman v. Armstrong World Indus., 980 F.2d 171 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993) 7

Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 2300 (1992) 21

Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989) 17

Mallick v. IBEW, 644 F.2d 228 (3d Cir. 1981) 7

McLendon v. Continental Can Co., 908 F.2d 1171 (3d Cir. 1990) 21

Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) 20, 22

Spang & Co. v. United States Steel Corp., 545 A.2d 861 (Pa. 1988) 13

Cases: **Page**

Taylor v. McKeithen, 407 U.S. 191 (1972) (per curiam).... 20

Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 3034 (1992).....9-11, 14, 15

United States v, Baynes, 548 F.2d 481 (3d Cir. 1977) (per curiam)..... 20

Yakus v. United States, 321 U.S. 414 (1944)..... 22

COURT RULES

3d Cir. IOP 6.2.1..... 18

3d Cir. IOP 6.2.2..... 18

3d Cir. IOP 9.3.1..... 1

3d Cir. IOP 9.3.2..... 1

3d Cir. IOP 9.3.3..... 1

Fed. R. App. P. 35(a)..... 1

Fed. R. App. P. 40(a)..... 2

Fed. R. Civ. P. 50..... 6

Fed. R. Civ. P. 51..... 4

INTRODUCTION

On April 7, 1993, a panel of this Court, composed of Circuit Judges Stapleton, Roth and Lewis, entered a Judgment Order affirming the district court's final judgment entered August 25, 1992 in *Ebeling & Reuss, Ltd. v. Swarovski Int'l Trading Corp.*, Civil Action No. 88-4878 (E.D. Pa.). From this Judgment Order, the defendants in the district court (the "Swarovski defendants") seek rehearing in banc.

Each of the eight issues raised in the Swarovski defendants' appeal at No. 92-1746 concerned either (1) whether sufficient evidence existed to support the jury's verdict or (2) whether the district court correctly applied Pennsylvania law to the facts established at trial.

Federal Rule of Appellate Procedure 35(a) provides that the extraordinary remedy of rehearing in banc "will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a); *see also* 3d Cir. IOP 9.3.1.

This Court's Internal Operating Procedures state that rehearing in banc should not be granted to review a panel's determination that sufficient evidence exists to support a jury's verdict. 3d Cir. IOP 9.3.2. This Court's Internal Operating Procedures also state that rehearing in banc should not be granted where the issue presented is one of state law. 3d Cir. IOP 9.3.3.

Because the Swarovski defendants seek rehearing in banc of a Judgment Order through which the panel rejected their challenges (1) to the sufficiency of the evidence and (2) to the application of Pennsylvania law to the facts of this case, this is not an appropriate matter for rehearing in banc.

As to panel rehearing, it cannot fairly be said that the panel misapprehended or overlooked any point of law or fact. In their petition, the Swarovski defendants revisit many of the arguments presented at length in their briefs on appeal and argued to the panel by defendants' counsel for more than twenty-five minutes during oral argument on March 16, 1993. Because the

panel did not misapprehend or overlook any points of law or fact, no basis for panel rehearing exists. *See* Fed. R. App. P. 40(a).

For these reasons, this Court should deny the petition for rehearing.[1]

ARGUMENT

I. THE PANEL CORRECTLY HELD THAT SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE CONTRACT BETWEEN EBELING & REUSS AND THE SWAROVSKI DEPENDANTS HAD A DEFINITE DURATION

In the first of *five* separate arguments as to why rehearing should be granted, the Swarovski defendants erroneously assert that the evidence at trial conclusively proved a contract of indefinite duration between Ebeling & Reuss ("E&R") and the Swarovski defendants. Based upon that mistaken premise, the Swarovski defendants contend that the contract was terminable at will. The Swarovski defendants proceed to argue that the panel "misapplied" three Third Circuit decisions (two of which were not even cited in the briefs on appeal).

The Swarovski defendants' argument misses the point. The panel correctly rejected the terminable at will argument because sufficient evidence supported the jury's finding that the contract between E&R and the Swarovski defendants had a definite duration.

At trial, E&R introduced evidence that the agreement was to last for the life of the product line, defined as the life cycle of the Swarovski-manufactured miniature crystal figurines. *See* App. at 1824-30, 1856-58, 1926. E&R introduced additional

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1. These consolidated appeals mark the second time that this dispute has been before this Court. In 1988, the Swarovski defendants took an appeal to this Court from the district court's entry of a preliminary injunction in Ebeling & Reuss's favor requiring defendants to product twenty-four sample Crystal Signatures Disney character figurines on or before August 30, 1988. This Court affirmed the preliminary injunction in an unpublished decision. *See Ebeling & Reuss, Ltd. v. Swarovski Int'l Trading Corp.*, 866 F.2d 1409 (3d Cir. 1988) (table).

evidence showing that the life of the product line was understood between the parties to mean ten to twelve years, which is comparable to the product cycle of Swarovski's faceted Silver Crystal line. *See* App. at 1812-13, 1857, 2017; Supp. App. at 18. E&R also introduced evidence at trial demonstrating that Dr. Martin Halusa, an official of the Swarovski entities, agreed that ten years was a reasonable duration for the agreement. *See* App. at 1997-99, 4144.

If that were not enough, the jury had evidence before it indicating that the Swarovski defendants agreed to a minimum duration of *at least* five years when they approved, instead of vetoing, E&R marketing materials stating that the product line would consist of at least "forty new pieces a year for the next five years." *See* App. at 1874-83; Supp. App. at 126. Thus, sufficient evidence existed to permit the jury to find that the contract had a definite duration of at least five years, the very duration the Swarovski defendants approved in their review of E&R's marketing materials. *See* Supp. App. at 126.[2]

Only by ignoring key evidence presented to the jury can the Swarovski defendants contend in their rehearing petition that E&R sought to prove a contract that "contained an express term of duration which was inherently indefinite."[3] *See* Petition for Rehearing at 5. This assertion is simply wrong. When the record is viewed in its entirety, as it must be, it is clear that the panel correctly rejected the Swarovski defendants' contention that the contract between E&R and the Swarovski defendants

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2. The Swarovski defendants also attack the duration charge that the district court gave to the jury. For the reasons explained above, this argument lacks merit. Any challenge to the duration charge also is waived, because the Swarovski defendants failed to object to that charge at trial. *See* App. at 3423-33 (objections to charge); *see also* Fed. R. Civ. P. 51 ("[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection"). If that were not enough, the defendants have waited until their petition for rehearing to advance, for the first time on appeal, any challenge to the jury charge.

3. The argument relies on three lines of testimony at trial to the exclusion of thousands of pages of testimony and documentary evidence that was also before the jury.

was terminable at will. For these reasons, rehearing in banc should not be granted.[4]

II. THE PANEL CORRECTLY REJECTED THE SWAROVSKI DEFENDANTS' STATUTE OF FRAUDS ARGUMENT, WHICH IS BOTH WAIVED AND WITHOUT MERIT

In their second argument in support of rehearing, the Swarovski defendants argue that evidence of a contract between E&R and the Swarovski defendants was insufficient to satisfy the statute of frauds contained in Pennsylvania's Uniform Commercial Code. The Swarovski defendants proceed to argue that the panel's Judgment Order is contrary to this Court's opinion in *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991), where this Court examined the application of that Pennsylvania statute. The Swarovski defendants' argument is both waived and without merit.

At the close of E&R's case-in-chief, the Swarovski defendants filed a motion for a directed verdict.[5] *See* App. at 969-74. Absent from the motion made at the close of E&R's case-in-chief was any suggestion that the contract between the parties ran afoul of the statute of frauds. *See id.*

At the close of all the evidence, the Swarovski defendants, in a written document, renewed their motion for a directed verdict. Simultaneously, trial counsel for the Swarovski defendants orally moved for a directed verdict on the ground that "[t]here is no basis on which a jury could find that there existed any enforceable contract beyond a contract requiring Swarovski to manufacture and deliver the merchandise ordered in 1986

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4. Nor is panel rehearing appropriate, because it cannot be said that the panel overlooked or misapprehended any point of law or fact. This particular issue was presented in the briefs of the parties and was addressed at oral argument. *See* Opening Brief of Swarovski Defendants at pp. 25-29; Response Brief of E&R at pp. 23-26; Reply Brief of Swarovski Defendants at pp. 15-19; Transcript of 3d Cir. Oral Argument in Nos. 92-1723 & 92-1746 at pp. 4-7, 27-28.

5. This case was tried to judgment before the amendments took effect renaming the motions governed by Federal Rule of Civil Procedure 50. *Compare* Fed. R. Civ. P. 50 (version in effect through Nov. 30, 1991) *with* Fed. R. Civ. P. 50 (version currently in effect).

under 13 Pennsylvania C.S.A. Section 2201." App. at 3204. The statute counsel cited is Pennsylvania's Uniform Commercial Code statute of frauds, which this Court examined in *Advent.*

This Court has held that a motion for judgment notwithstanding the verdict is the equivalent of a post-verdict renewal of a party's motion for a directed verdict made at the close of the evidence. Thus, the motion for judgment notwithstanding the verdict cannot advance any grounds not set forth in the motion for a directed verdict made at the close of all the evidence. *See Bradford-White Corp. v. Ernst & Whinney,* 872 F.2d 1153, 1161 n.8 (3d Cir.), *cert. denied,* 493 U.S. 993 (1989).

Similarly, this Court has stated that a defendant's motion for a directed verdict made at the close of the evidence is properly viewed as the renewal of the defendant's motion for a directed verdict made at the close of plaintiff's case-in-chief. *See Mallick v. IBEW,* 644 F.2d 228, 233 (3d Cir. 1981). Thus, the motion for a directed verdict made at the close of all the evidence cannot, except in exceptional circumstances not present here, advance specific grounds not asserted in the motion for a directed verdict made at the close of plaintiff's case-in-chief. *See Fineman v. Armstrong World Indus.,* 980 F.2d 171, 184-85 (3d Cir. 1992) (only where claim arises after close of plaintiff's case-in-chief may defendant raise additional specific grounds for a directed verdict at the close of all the evidence), *cert. denied,* 113 S. Ct. 1285 (1993).

At trial, E&R introduced all of its evidence of the terms of its agreement with the Swarovski defendants during E&R's case-in-chief. By failing to move for a directed verdict on the ground of Pennsylvania's statute of frauds at the close of E&R's case-in-chief, the Swarovski defendants had already waived the issue by the time they raised that ground at the close of all the evidence. *See id.*

Even if the Swarovski defendants' statute of frauds argument had not been waived, the argument cannot succeed in light of this Court's ruling in *Advent.* There, this Court held that a non-exclusive requirements contract satisfies the statute of frauds even though no quantity is set forth in writing. *See Advent,* 925 F.2d at 678. Here the district court held the statute of frauds to be satisfied because the evidence introduced at trial

compelled the conclusion that E&R and the Swarovski defendants reached an exclusive requirements contract.[6] *See App.* at 1425.

E&R introduced at trial numerous writings drafted or approved by the Swarovski defendants evidencing the existence of a contract between them and E&R. *See* App. at 1821-34, 3860-64, 3866, 3880, 3886-87, 3904, 3916-17, 3992, 4035-36, 4043, 4050, 4056, 4064-65, 4364. This documentary evidence "leaves no doubt" that the parties intended to create a contract. *Advent*, 925 F.2d at 678. Such evidence was sufficient to satisfy the statute of frauds in *Advent*, *id.*, and it is likewise sufficient to satisfy the statute of frauds here. Thus, it is not the panel's Judgment Order which is in conflict with *Advent;* instead, it is the Swarovski defendants' argument in support of their petition for rehearing.

Because the Swarovski defendants have waived any challenge to the sufficiency of the evidence to satisfy Pennsylvania's statute of frauds, and because sufficient evidence exists to demonstrate that the contract at issue here satisfies the statute, as construed in *Advent*, this Court should deny the Swarovski defendants' petition for rehearing in banc.[7]

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6. In *Advent*, this Court explained why an exclusive requirements contract satisfies the U.C.C.'s statute of frauds:

> For present purposes, the salient factor is that exclusive requirements contracts satisfy the quantity requirements of the statute of frauds, albeit no specific amount is stated.
>
> The reasons for excepting exclusive requirements contracts from the strictures of the statute of frauds are strong. . . . To deny enforceability through a rigid reading of the quantity term in the statute of frauds would run contrary to the basic thrust of the Code—to conform the law to business reality and practices.

Advent, 925 F.2d at 678 (citations omitted).

7. Nor is panel rehearing appropriate, because it cannot be said that the panel overlooked or misapprehended any point of law or fact. This particular issue was clearly presented in the briefs of the parties. *See* Opening Brief of Swarovski Defendants at pp. 32-35; Response Brief of E&R at pp. 28-31; Reply Brief of Swarovski Defendants at pp. 21-23;

III. THE PANEL CORRECTLY HELD THAT SUFFICIENT EVIDENCE SUPPORTS THE JURY'S AWARD OF LOST PROFITS

In their third argument in support of rehearing, the Swarovski defendants contend that insufficient evidence supports the jury's award of lost profits. Specifically, the Swarovski defendants contend: (1) that the Judgment Order affirming E&R's recovery of lost profits for Disney-licensed products violates *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 734-35 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 3034 (1992); and (2) that E&R's evidence of lost profits is insufficient to satisfy the standards this Court discussed in *Advent* and *Tunis Bros*, Neither contention has merit.

A. *The Disney License*

The Swarovski defendants' challenge to the sufficiency of the evidence to support the recovery of lost profits for Disney-licensed products is based upon a misunderstanding of this Court's decision in *Tunis Bros.*

In *Tunis Bros.*, plaintiff sought to recover lost profits from defendant for a ten-year period based upon defendant's fraudulent termination of its franchise agreement with plaintiff. *See* 952 F.2d at 734. However, this Court noted that the evidence introduced at trial in that case supported only one conclusion: defendant's franchise agreement with plaintiff would have lasted just two to three more years. *Id.* at 735. Thus, this Court wrote that "upon remand, the compensatory damages must be limited to that two to three year period of time dating from the 1981 franchise termination." *Id.*

Here, by contrast, the Swarovski defendants seek to limit their liability to E&R for lost profits based upon the length of the initial term of E&R's licensing agreement with Walt Disney Co., a third party.[8] E&R introduced sufficient evidence at trial to permit the jury to determine, as it did, that the relationship between E&R and Disney would have continued far beyond the initial term of the Disney licensing agreement if the Swarovski

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8. The licensing agreement between E&R and Disney permitted E&R to market Swarovski-manufactured pressed crystal figurines depicting Disney characters in exchange for substantial royalties to Disney. *See* App. at 4127-39.

defendants had performed, instead of breaching, their contract with E&R. *See* App. at 1925-27, 2058-60, 2085-86; Supp. App. at 2 (Disney's director of giftware marketing is effusive in her praise of E&R's Disney character crystal figurines).[9]

Again, it is the Swarovski defendants' argument in support of rehearing that is contrary to a decision of this Court. *See American Medical Imagine Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 694 (3d Cir. 1991) ("we know of no rule requiring that evidence of lost earnings identify the particular customers and hypothetical transactions that would have produced revenues"). For these reasons, rehearing in banc is not appropriate.[10]

B. *E&R's Damages Expert*

Similarly, E&R's evidence of lost profits is more than sufficient to satisfy the standards this Court discussed in *Advent* and *Tunis Bros.*

In *Advent,* to guide the district court on remand, this Court explained that plaintiff was not entitled to rely upon "rosy predictions" of total industry-wide sales in the marketplace since those estimates had been contradicted by actual industry sales during the years in question. *See Advent,* 925 F.2d at 681.

Here, the Swarovski defendants rely on this Court's reasoning in *Advent* to suggest that the projection of E&R's sales of Swarovski products from 1987 to 1989 (as opposed to industry-wide sales) must be ignored in favor of the sales of Swarovski products E&R actually realized in those years. To apply *Advent* in the manner the Swarovski defendants suggest would permit them to reap the benefit of their own wrongful conduct, in

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9. This Court's actual holding in *Tunis Bros.* is not implicated here. As explained above, E&R introduced evidence that the duration of its contract with the Swarovski defendants was for a period of ten to twelve years. E&R's lost profits projections were limited to that ten- to twelve-year period.

10. Nor is panel rehearing appropriate, because it cannot be said that the panel overlooked or misapprehended any point of law or fact, given the clarity with which this particular issue was presented in the parties' briefs and at oral argument. *See* Opening Brief of Swarovski Defendants at pp. 43-44; Response Brief of E&R at pp. 31-34; Reply Brief of Swarovski Defendants at pp. 26-27; Transcript of 3d Cir. Oral Argument in Nos. 92-1723 & 92-1746 at pp. 7-10, 32-33.

violation of Pennsylvania law. *Advent*, as the district court correctly noted, *see* App. at 1427-29, does not so hold.

In January of 1987, six months after performance under the contract had begun, and in breach of the parties' obligations of good faith and fair dealing, the governing body of the Swarovski defendants authorized Lawrence Metcalfe of Swarovski America to send a letter to E&R's retail customers informing them, falsely, that E&R had no right to use the Swarovski name and stating, falsely, that Swarovski had no connection with E&R's Crystal Signatures line. *See* App. at 4038. Helmut Swarovski, a principal of the defendants, admitted that the Metcalfe letter had a negative effect on E&R's ability to market the line. *See* Supp. App. at 23-26, 28-29. In addition, the Swarovski defendants' breach of the agreement by making tardy deliveries in late 1986 and early 1987 of the products E&R had ordered further caused the diminution of E&R's actual sales. *See* App. at 1899-1930.

To adopt the Swarovski defendants' reasoning would be to reward them for the harm they inflicted upon E&R. *Advent* does not compel such a result, which would be contrary to well-settled Pennsylvania law. *See Spang & Co. v. United States Steel Corp.*, 545 A.2d 861, 867 (Pa. 1988) (under Pennsylvania law of damages, wrongdoer must bear the risk of uncertainty that his own wrong has created). Here, E&R's reduced actual sales prove the damage the Swarovski defendants inflicted. The actual sales data certainly do not establish the sales E&R would have generated if the Swarovski defendants had not breached their agreement.

Unlike in *Advent*, there is no evidence here that industry performance contradicted the projections of E&R's damages expert, Stephen Cook of Price Waterhouse.[11] Thus, the Swa-

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11. The Swarovski defendants themselves were in the crystal marketing industry at all relevant times. If actual industry performance had contradicted E&R's projections (which the Swarovski defendants even now do not suggest), the Swarovski defendants certainly had the ability to introduce such evidence. Contrary to the impression the Swarovski defendants seek to create, the estimates E&R relied upon at trial: (1) were considered reasonable by the Swarovski parties before this suit commenced, *See* App. at 1855, 1862-64, 1872-73, 1903-05, 3982; (2) were consistent with the Swarovski parties' own

rovski defendants' assertion that the panel entered its Judgment Order in violation of this Court's decision in *Advent* lacks merit.

The Swarovski defendants also contend that Cook's damages projections were not based on the types of objective evidence that this Court discussed in *Tunis Bros.*, 952 F.2d at 738-39. The Swarovski defendants' contention overlooks a critical portion of Cook's testimony at trial, where he explained that he did not rely solely or uncritically upon E&R's internal profit projections. Instead, Cook undertook exactly the type of inquiry suggested in *Tunis Bros.* Cook assured himself that the lost profit projections he used were objectively reasonable. *See* App. at 2298-2318, 2377-85. If that were not enough, the internal profit projections Cook used were accepted as correct by the Swarovski defendants at the time E&R made the projections, before the Swarovski defendants breached their contract with E&R, and were consistent with the Swarovski defendants' secret projections for their own "knock-off" line. *See* App. at 2378-81, 4153-91.[12]

Only by overlooking Cook's testimony describing the numerous objective factors he relied upon in formulating his lost profit projections, as well as substantial other evidence, can the Swarovski defendants suggest that "E&R's damage testimony is irredeemably speculative and wholly insufficient under the law of this Circuit . . . ." *See* Petition for Rehearing at 9. To the

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NOTES *(Continued)*

secret projections, made without even considering the Disney series, of $19 million in profits over the first three years, *see* App. at 1982-84, 2880-81, 4182-83; Supp. App. at 12-13, 27; and (3) were consistent with Swarovski America's sales of the knock-off "Crystal Collectibles" line, which was not marketed as effectively as E&R had marketed its "Crystal Signatures" line, *see* App. at 3119-22, 3160-61.

12. The Swarovski defendants attempt to ignore all of this evidence, citing only to a chart Cook used at trial to illustrate his lost profit projections, *see* App. at 4527, instead of citing to the testimony Cook delivered at trial in support of how he objectively arrived at the figures reflected on the chart, *see* App. at 2377-85.

contrary, the panel correctly rejected this argument because E&R introduced sufficient evidence supporting the jury's award of lost profits.[13]

The panel's Judgment Order does not conflict with this Court's decisions in *Advent* and *Tunis Bros.* Instead, the Judgment Order is in accord with this Court's decision in *American Medical Imaging*, 949 F.2d at 694, where this Court said: "[i]ndeed, the fact that [plaintiff's lost profit] projections were formulated in the regular course of business prior to the alleged loss may commend them to the trier of fact as more reliable than if they had been prepared after the fact for purposes of litigation." Accordingly, the Swarovski defendants' request for rehearing in banc should be denied.[14]

IV. THE PANEL CORRECTLY UPHELD THE JURY'S PUNITIVE DAMAGE AWARD

In their fourth argument in support of rehearing, the Swarovski defendants contend that the panel's Judgment Order is contrary to decisions of the Second, Fourth and Eleventh Circuits in that the panel is alleged to have allocated "the entire lump-sum punitive damage award to only one of the [two] claims

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13. At oral argument, counsel for the Swarovski defendants conceded that the jury had sufficient evidence to support its award of lost profits. Transcript of 3d Cir. Oral Argument in Nos. 92-1723 & 92-1746 at pp. 14-15. Counsel for the Swarovski defendants made clear that his challenge was limited to whether Cook had a sufficient basis for his lost profits projections. *See id.* Such a challenge was unlikely to succeed in the face of *Advent*, where this Court noted that under Pennsylvania law, expert testimony is admissible to prove future lost profits so long as it is "based on anything more than individual opinions or conjecture." 925 F.2d at 681.

14. Nor is panel rehearing appropriate, because it cannot fairly be said that the panel overlooked or misapprehended any point of law or fact. The Swarovski defendants' challenge to the sufficiency of the evidence to support an award of lost profits was discussed in the briefs of the parties and was addressed at oral argument. *See* Opening Brief of Swarovski Defendants at pp. 35-42; Response Brief of E&R at pp. 31-34; Reply Brief of Swarovski Defendants at pp. 23-28; Transcript of 3d Cir. Oral Argument in Nos. 92-1723 & 92-1746 at pp. 9-16, 28-32.

on which that award was based . . . ." *See* Petition for Rehearing at 10. Neither premise upon which this argument is based has merit.

E&R's claim for punitive damages arose under Pennsylvania law. None of cases the Swarovski defendants point to from the Second, Fourth or Eleventh Circuits applies Pennsylvania law. Instead, those decisions apply the law of other states. Thus, the Swarovski defendants are mistaken when they say that the panel's Judgment Order gives rise to a circuit conflict.

The panel's decision represents a correct application of Pennsylvania law to the particular circumstances of this case. The Swarovski defendants do not contend otherwise.

The Supreme Court of Pennsylvania explained in *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803 (Pa. 1989), that under Pennsylvania law the purpose of punitive damages is to "punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct . . . ." Thus, under Pennsylvania law it is not the number of claims that determines the amount of punitive damages that may be awarded; instead, it is the underlying conduct giving rise to a claim for which punitive damages may be awarded.

The district court upheld the jury's finding that the Swarovski entities defrauded E&R Co. The evidence introduced in support of that finding encompassed all of defendants' outrageous conduct that the jury heard about and saw at trial. The Swarovski entities engaged in a single scheme of fraudulent conduct that began before the time they entered into their contract with E&R Co. and ended at the time that E&R Ltd. discovered, after initiating this lawsuit, that the Swarovski entities were themselves actually selling the pressed crystal figurine line, in violation of E&R's exclusive rights in that line. It is this conduct for which the Swarovski defendants remain liable for fraud, and it is this very same conduct (and no other) upon which the jury based its award of punitive damages.[15]

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15. The district court charged the jury that the only claim on which it could return an award of punitive damages was E&R's fraud claim. *See* App. at 3580.

Because the panel's decision represents an unchallenged, proper application of Pennsylvania law, and because the Swarovski defendants' assertion of a circuit conflict is specious, the Swarovski defendants' petition for rehearing in banc should be denied.[16]

V. THE PANEL'S JUDGMENT ORDER IS NOT CONTRARY TO THIS COURT'S INTERNAL OPERATING PROCEDURES

In their final argument as to why rehearing should be granted, the Swarovski defendants contend that the panel's disposition of this appeal by means of a Judgment Order somehow violates this Court's Internal Operating Procedures. This argument is utterly devoid of merit.

Chapter 6 of this Court's Internal Operating Procedures governs the use of a Judgment Order. Third Circuit IOP 6.2.1 provides in pertinent part: "[a] judgment order is filed when the panel unanimously determines to affirm the judgment or order of the district court . . . and determines that a written opinion will have no precedential or institutional value." Third Circuit IOP 6.2.2 provides in pertinent part that a Judgment Order may be used when: "(b) Sufficient evidence supports a jury verdict; . . . (d) No error of law appears; . . . ."

As explained above, the Swarovski defendant's appeal at No. 92-1746 challenged the sufficiency of the evidence to support the jury's verdict and the application of Pennsylvania law to the facts the jury found. In their petition for rehearing, the Swarovski defendants fail to point to any question of first impression presented in their appeal. Instead, the Swarovski defendants are left to suggest that this case would be of precedential value in illustrating the application of existing

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16. Nor is panel rehearing appropriate, because it cannot fairly be said that the panel overlooked or misapprehended any point of law or fact. This challenge to the jury's award of punitive damages was addressed in the briefs and discussed at oral argument. *See* Opening Brief of Swarovski Defendants at pp. 44-46; Response Brief of E&R at pp. 35-37; Reply Brief of Swarovski Defendants at pp. 28-30; Transcript of 3d Cir. Oral Argument in Nos. 92-1723 & 92-1746 at pp. 19, 33-39.

precedent to the facts of this case. If that were the standard governing the use of Judgment Orders, no appeal could ever be decided in that manner.

Dismayed by the panel's ruling affirming the district court's final judgment,[17] the basis of which the district court explained in a seventy-five page unpublished opinion, *see* App. at 1394-1468, the Swarovski defendants are relegated to impugning the integrity of the judges on the panel. While any litigant with ink and paper has the ability to suggest that three distinguished Circuit Judges of this Court improperly used a Judgment Order to "conceal divisive or disturbing issues," *see* Petition for Rehearing at 12, the petition for rehearing falls far short of substantiating such a grave assertion.

Lastly, the Swarovski defendants suggest that a Judgment Order may not be used to affirm an award of punitive damages. To the contrary, under this Court's Internal Operating Procedures, a Judgment Order may be so used. Judgment Orders are even utilized to affirm judgments of conviction and sentence in criminal cases, where a defendant's liberty is at stake. *See United States v. Baynes*, 548 F.2d 481, 482-84 (3d Cir. 1977) (per curiam) (rejecting due process challenge to affirmance of conviction by Judgment Order).[18]

In any event, the Swarovski defendants have admitted that they failed to preserve a due process challenge to the jury's award of punitive damages. In their forty-nine page opening brief on appeal, the Swarovski defendants did not advance a due process challenge to the jury's award of punitive damages or even cite to the Supreme court's opinion in *Pacific Mut. Life Ins.*

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17. It deserves to be noted that the Judgment Order also upholds those portions of the district court's final judgment that set aside the jury's verdict in E&R's favor on E&R's claims of tortious interference, unfair competition and trade secret theft, which resulted in setting aside $13,291,364.00 in damages. Mindful of this Court's admonition that rehearing will not be granted to review a Judgment Order, E&R has not sought rehearing of the panel's affirmance of these portions of the district court's final judgment, from which E&R had appealed.

18. In *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam), the Supreme Court wrote: "[w]e, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances."

Co. v. Haslip, 111 S. Ct. 1032 (1991). Instead, the Swarovski defendants opted in their opening brief to challenge the sufficiency of the evidence to support the fraud claim that gave rise to punitive damages and the sufficiency of the evidence of outrageous conduct to support *any* award of punitive damages.[19]

The due process challenge advanced in the petition for rehearing was not raised on appeal until the Swarovski defendants' reply brief. *Compare* Swarovski Defendants' Opening Brief at pp. 46-48 *with* Swarovski Defendants' Reply Brief at pp. 31-32 and Petition for Rehearing at pp. 12-14. Thus, the Swarovski defendants have forever waived any due process challenge they may have had. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.,* 492 U.S. 257, 277 & n.23 (1989) (due process challenge to award of punitive damages waived for failure to preserve issue at necessary points in proceedings below); *McLendon v. Continental Can Co.,* 908 F.2d 1171, 1183 (3d Cir. 1990) ("[s]ince the reply brief is the final written word from appellate parties without leave of the court, R. App. P. 28(c), it would be manifestly unfair to permit an appellant to interject issues to which the appellee cannot now respond").[20]

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19. In footnote 12 of their rehearing petition, the Swarovski defendants cite two Third Circuit cases for the proposition that clear and convincing evidence of outrageous conduct is required before punitive damages may be imposed. Any challenge to the sufficiency of the evidence to support an award of punitive damages was waived at trial, as the Swarovski defendants never raised such a sufficiency challenge in their directed verdict motions. Even if the point were not waived, the cases the Swarovski defendants cite do not apply to actions governed by Pennsylvania law. The two cases, *Acosta v. Honda Motor Co.,* 717 F.2d 828 (3d Cir. 1983), and *Dunn v. HOVIC,* No. 91-3837 (3d Cir. Sept. 18, 1992), *vacated upon grant of reh'g in banc,* (3d Cir. Oct. 8, 1992), both arose under Virgin Islands law. Under Virgin Islands law, clear and convincing evidence is the standard of proof applicable to outrageous conduct to support an award of punitive damages. Under Pennsylvania law, which governs this action, this Court has held that a plaintiff "must show outrageous conduct by a preponderance of the evidence." *Hughes v. Consol-Pennsylvania Coal Co.,* 945 F.2d 594, 616 (3d Cir. 1991), *cert. denied,* 112 S. Ct. 2300 (1992). In their rehearing petition, the Swarovski defendants do not challenge E&R's ability to satisfy the preponderance of the evidence standard of proof; in fact, such a challenge would clearly lack merit.

20. *See also Yakus v. United States,* 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional

Before the panel, the Swarovski defendants conceded that they waited too long to assert a *Haslip* challenge on appeal. *See* Transcript of 3d Cir. Oral Argument in Nos. 92-1723 & 92-1746 at p. 20; Swarovski Defendants' Response Filed Dec. 24, 1992 to Motion to Strike at p. 3.[21]

The panel did not violate this Court's Internal Operating Procedures when it affirmed by Judgment Order the final judgment of the district court.

NOTES *(Continued)*

right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

21. An additional point deserves response. As explained above in the text, an inquiry into the proportionality of the punitive damages awarded to the net worth of the Swarovski defendants is foreclosed by waiver. Even if that point were not foreclosed, the Swarovski defendants have never come forward with their actual net worth, which is the inquiry required under the Alabama scheme upheld in *Haslip*, 111 S. Ct. at 1044-45. The stipulation reached at trial was that the Swarovski defendants had a net worth of *in excess of* $200 million. *See* App. at 3517-18, 3528. This stipulation does not minimize the likelihood that the ratio of punitive damages to the Swarovski defendants' actual net worth is around 1%, or even lower. *See Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990) (suggesting typical ratio of punitive damages to a defendant's actual net worth).

CONCLUSION

For all the foregoing reasons, this Court should deny the petition for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of this document were served via hand delivery upon the attorney for appellants/cross appellees, at the address and on the date that appear below:

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/s/ HOWARD J. BASHMAN
Howard J. Bashman

Dated: May 5, 1993